MAR 17 1975

IN THE

Supreme Court of the United States

MARCH TERM, 1975

NO. A-74-1171

NAPOLEON C. GABRIEL and MICHAEL MOUMOUSIS, as CLASS B STOCKHOLDERS in MISSOURI PACIFIC RAILROAD COMPANY, for themselves and all others similarly situated,

Appellants.

—v.—

BETTY LEVIN, on behalf of herself and all other holders of CLASS B COMMON STOCK of MISSOURI PACIFIC RAILROAD COMPANY, and on behalf of said corporation, and ROBERT LEVASSEUR and ALLEGHANY CORPORATION,

Plaintiffs-Appellees,

—against—

MISSISSIPPI RIVER CORPORATION, MISSOURI PACIFIC RAILROAD COMPANY, ROBERT H. CRAFT, T. C. DAVIS and THOMAS MILBANK,

Defendants-Appellees.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Opening Statement

Petitioners-appellants, as members of a class purportedly represented by plaintiffs-appellees, seek a Writ of Certiorari to review a certain judgment of the United States Court of Appeals for the Second Circuit, rendered and entered on the 18th day of December 1974, affirming certain orders and judgments of the Federal District Court, S.D.N.Y., from which orders and judgment petitioners had appealed.

Opinions Below

The judgment of the 2nd Circuit Court of Appeals, rendered without opinion, appears at page A1, which judgment, as far as petitioners know, lacks an official reported citation.

The opinion of the New York Southern Federal District Court, upon which was based a judgment settling attorneys fees in the class action below, appears at pages A3-A13 of this petition, and is officially reported under citation 377 F.Supp. 926 (June 26, 1974).

The memorandum opinions of the New York Southern Federal District Court denying the motion of Michael Moumousis dated December 7, 1973, and that of the same court denying the motion of Napoleon C. Gabriel, dated April 8th, 1974, appears at pages A14-A15 of this petition.

The opinion of the New York Southern Federal District Court approving and setting forth the settlement terms of the original action commenced by Levin et al., plaintiffs-appellees in December 1967, and reported in *59 F.R.D. 353* (March 19, 1973), appears in this petition at page A16 and the judgment of said District Court dated May 2nd, 1973 implemented said approval.

Jurisdiction

This Courts jurisdiction is invoked under 28 U.S.C. § 1254(1), the judgment of the 2nd Circuit Court of Appeals having been rendered and entered the 18th day of December 1974. (A1-A2).

Despite anything to the contrary in the opinions and judgments of the Federal District Court S.D.N.Y., the jurisdiction of that court was based by plaintiffs-appellees *solely* on diversity of citizenship of plaintiffs-appellees with defendants-appellees, 28 U.S.C. 1332(a).

Questions Presented

Question 1

Does not this petition merit the precious limited time of this Supreme Court, in light of the facts that: a) the spurious class *action for better dividends* was purportedly settled under Rule 23(e) F.R.C.P. for an ordered recapitalization of Mo Pac, which was never in issue in the original suit and far removed from the same; b) the recapitalization settlement arbitrarily set the value of appellant's B Mo Pac stock at $2,450 instead of its true value of $22,500, without any right to opt out or to obtain an evaluation; c) that large corporations for their own interests may start class suits on one theory, corral all small owners into a box canyon, and then force a settlement on such captive stockholders, which settlement has nothing to do with the original suit, and forces the represented stockholders to give up their property without evaluation and due process of law; d) no property owners right is safe anywhere in the United States if such abuse of Rule 23(e) F.R.C.P., as was done below for whatever good intent, is sanctioned under law; e) under law and fact no one gave authority to Alleghany, Levin and LeVasseur to represent petitioners

to sell their stock for less value in a recapitalization settlement?

Question 2

Did not the Federal District Court below lack jurisdiction of the subject matter to so bind these appellants by its judgment of settlement of March 19, 1973, in as much as these appellants, (owning only 5 and 2 shares of Mo Pac Class B stock, and 76.1% of all of the B stockholders owning 10 shares or less), and others, did not meet the jurisdictional requirement of $10,000, exclusive of costs and interest, [28 U.S.C. 1332(a)], to be bound, the basis of jurisdiction for the suit for better dividends having been founded solely on diversity of citizenship plus $10,000.00 in controversy?

Question 3

Was not the settlement judgment of March 19, 1973, no matter how well intentioned: a) a nullity and business advice beyond the adjudicatory power of the District Court, which is restricted to *"cases and controversies"* only, in that the class suit sought to be settled was for better dividends for Class B stockholders, and the judgment of settlement called for an entire recapitalization of Mo Pac, [something for which there could be no suit], and arbitrarily established the value of Class B stock at $2,450.00 per share so as to reduce the equity of Class B stockholders in Mo Pac from 65.5% to 25.5% : and

b) violative of appellants' civil rights and right to due process in that the value of the Class B stock was established for settlement purposes only, and appellants were offered no opportunity to opt out and have the true value of their stock determined in a separate due process court proceeding: and

c) contrary to the authority of Rule 23(c) F.R.C.P. in that Alleghany Corporation, (supposedly representing appellants and other Class B stockholders), could not be truly representative, because of an undisclosed self interest, (its stock being under the continuing jurisdiction of the I.C.C.), in the recapitalization of Mo Pac from a tax standpoint, and from its financial desire to be governed by the I.C.C. rather than the S.E.C., all of which resulted in Alleghany not representing the "common" interests of all?

Question 4

a) Was not the granting of fees in the case below to the Levin-LeVasseur attorneys for services performed in an entirely different and prior suit [*Levin* v. *Mississippi River Fuel Corp.*, 386 US 162 (1967)], violative of the rights of appellants and other Class B stockholders of Mo Pac, particularly when the application for such fees in the prior different case was previously denied said attorneys by the United States Court of Appeals 8th Circuit (*Missouri Pac. R. Co.* v. *Slayton*, 407 F2d 1078), so as to constitute the law of the case if not res judicata?

b) Was not the granting of fees premature, because by the stipulation of settlement, and the opinion and judgment approving the same, such fees were to be settled only "after such final judgment is no longer subject to appeal"?

Rules Involved

Rule 23 of the Federal Rules of Civil Procedure provides in pertinent part:

> (a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if . . . (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Statement and Reasons for Granting the Writ

Factual Background

The Second Circuit Federal Court of Appeals, despite appeals of appellants, has confirmed all that was done by the Federal District Court S.D.N.Y. in the case below. (A1-A2).

In December, 1967 the original suit was commenced by Betty Levin against the defendants-appellees for better dividends for Class B Mo Pac stockholders, the action being made into a class action, by order of the Federal District Court S.D.N.Y., on October 9th, 1968, with no intervenors after December 20, 1968.

The basis of jurisdiction of the said Federal District Court was, throughout the entire litigation, despite anything said to the contrary, *solely diversity of citizenship*, and no other base. The record of the pleadings shows that no plaintiff representative ever claimed that jurisdiction was based on Section 10(b) of the Securities Exchange Act of 1934, as claimed by the Courts below.

On May 2, 1973, the Federal District Court, S.D.N.Y., by judgment, pursuant to Rule 23(e) F.R.C.P., approved a so called settlement of the suit for better dividends, which provided for a complete recapitalization of Mo Pac. (Opinion A16-A46). Recapitalization was never claimed in the original suit and thus was never in issue in the litigation.

This plan of recapitalization of Mo Pac required, among other things, that appellants, and other members of the represented class of Class B stockholders of Mo Pac, give up their shares at an arbitrary value of $2,450.00, instead of $22,500 its true value, and have their equity in Mo Pac

reduced from 65.5% to 25.5%, without any right of evaluation under the 1954 ICC "Agreed Plan" of Reorganization. This essentially is what appellants object to. (A38).

As the conditions precedent to the finalization of the settlement agreement were in progress of completion, it was discovered for the first time that Alleghany Corporation, (owners of the majority of Class B stock of Mo Pac—21,243 shares out of 39,731 shares of B outstanding), whose approval of the stipulation of settlement so impressed the District Court judge that the settlement was advantageous, was not really representative of appellants and other Class B stockholders. (Cf. A41).

The complex financial and tax factors involved for the advantage of Alleghany in disposing of its Mo Pac B stock in bulk at an arbitrary low price, relate to its acquisition on September 4, 1968 of the Jones Motor Co. Inc., and the fact that Alleghany's Mo Pac stock "be continued subject to the continuing jurisdiction of the Commission" [I.C.C.]. (Alleghany Corporation Control and Purchase of Jones Motor Co., Inc. —— and Control Erie Trucking Company No. M.C.-F-10444, 109 MCC 333, 350, decided January 27th, 1970). This was a condition for ICC approval and came to appellants attention through an affidavit of Alleghany's attorney, M. Lauck Walton, October 6, 1973, which was filed with the I.C.C. urging the Commission to approve the settlement. In this affidavit, the argument was advanced that the divestiture by Alleghany of its Class B stock would be in keeping with the public interest, the prior order of the ICC (Jones Motor Co. Inc., 109 MCC 333), and would save Alleghany from great financial injury and relieve the ICC of the burden of its supervision of trust of the Alleghany Mo Pac stock.

Appellant Moumousis' motion to the District Court, (S.D.N.Y.), to set aside its prior judgment of settlement

on the basis of the self interest of Alleghany Corporation which conflicted with that of the other Class B Mo Pac stockholders was denied on December 7, 1973, the denial of the said District Court being affirmed December 18, 1974. (A14).

Appellant Gabriel moved the Federal District Court, S.D.N.Y., on February 22, 1974, that he and other Class B stockholders be relieved of the recapitalization settlement judgment of May 2nd, 1973, on the basis of the then recently decided case of this Honorable Court, *Zahn* v. *International Paper Company* (414 U.S. 291 (1973). Both Gabriel and Moumousis, plus 920 individuals of the 1,200 persons owning Class B Mo Pac stock, (76.1% of such owners), own 10 shares or less. Gabriel and Moumousis own 5 and 2 shares respectively, and by no stretch of the imagination would they have the $10,000 jurisdictional amount in controversy, in the original suit for dividends, to be subject to the District Court's jurisdiction. This motion of Gabriel was denied by the District Court and affirmed by the 2nd Circuit on December 18, 1974. (A15; A1-2).

On July 2, 1974, the Federal District Court rendered a judgment setting fees for plaintiffs-appellees attorneys—Alleghany's $850,000, Levin's and LeVasseur's $1,772,422.06, said latter fee, including services in a prior previous litigation not involving the same issues, and for which prior services the Eighth Circuit Court of Appeals refused to award any legal fee. [*Missouri Pac. R. Co.* v. *Slayton*, 407 F.2d 1078].

Further and older background facts are essential for an understanding of this petition. On July 29, 1954, the I.C.C. reported out the *Missouri Pacific Railroad Company Reorganization* (Finance Document No. 9918), approved by

the Court, [(129 F.Supp. 392 (E.D. Mo.); cert. denied 350 U.S. 959 (1956)].

By the reorganization of 1954, under the Agreed Plan, the stock of Mo Pac, up to the time of the decision below approving recapitalization of Mo Pac, consisted of Class A, which is non-cumulative and non-convertible, entitled to a maximum of $5 dividend per share per annum when and if earned and declared and no more in any one year, and on dissolution or liquidation of Mo Pac no more than $100 per share out of the assets of Mo Pac; Class B, which represented the entire equity over and above the obligations of Mo Pac not only to the A stockholders but to any other creditors. (Cf. Missouri Pac Reorganization supra p. 8).

As of December 31, 1972, there were about 1,860,000 shares of A stock outstanding, at $100 a share, liquidating value of which amounted to $186,000,000. On the same date the Class B stockholders had the following retained income, over and above all obligations of Mo Pac, including the obligations to the Class A stockholders, of $349,192,000. In addition Class B also had claim to $545,000,000 in property values including land and land rights. Broken down, on the above fiscal facts, each share of Class A was worth $100 and no more; each share of Class B was worth $22,500.

As the unreasonable result of the court ordered recapitalization, without right of evaluation, Class B stock which represented, prior to the so-called settlement, ownership of 65% of the equity of Mo Pac was reduced to 25%, whereas the A stock was increased from 35% to 75% of equity. This improper taking of the B stockholders property without payment or evaluation, only takes into account the retained income of $349 million belonging to Class B, as

of December 31, 1972. The extent of the illegal taking, as to Class B stockholders' rights, is far worse when one considers the additional taking from Class B of $545 million in property and mineral and other land rights.

As a result of the wrongful recapitalization judgment below, unauthorized and entered into by Alleghany for its self-interest, Class B's value is reduced from $22,500 to $2,450 per share, the difference being transferred without legal right to the A stockholders. To add insult to injury, those B stockholders, such as petitioners, who stand up for their rights to their property, were cut off by the judgment below from having their stock evaluated according to due process. (Cf. A37-38).

Answer to Question #1

Yes, this petition merits acceptance by this Honorable Court, even taking into account the limited precious time of this high and essential Court.

What is at stake here is the cornerstone of our Republic, and its citizens' freedom—viz. the right to own private property, and the right not to have that property taken away without due process of law.

In this case, under the pretext of a Federal District Court judgment, the petitioners and other Class B Mo Pac stockholders had taken away from them, without any right for evaluation, their Class B stock worth $22,500 per share, at an arbitrary price of $2,450. The court below did not attempt to determine the actual value of the Class B stock, but determined the $2,450 for settlement purposes by "balancing of likelihoods rather than an actual determination of the facts . . . ." (59 F.R.D. 353 p. 361: A25, Cf. A37-38 infra).

The pretext of a judgment and judicial action arises, because the original class action was for better dividends, which action could have been abandoned, or at worst lost, without effecting in any way petitioners property rights in their stock. Under the guise of settling the said action under Rule 23(e), F.R.C.P., the representative plaintiffs-appellees went far beyond their representative authority, by not just abandoning the original suit, but by purporting to bind appellants and other Class B stockholders to an agreement for recapitalization of Mo Pac at the expense of appellants' own property. The representative plaintiff-appellees had no such authority to so bind appellants, and the Court below should not have rendered a judgment approving the so called settlement, as this was beyond the adjudicatory power of the court to do, and far removed from the issues of the case originally instituted in the court.

"A person who sues as a representative of a class does not possess all of the rights of the class. He may be the champion of all the members, but he is usually not the real party in interest for all of them as that term is used in Rule 17(a)" (Moore's Federal Practice 23.02-2 Fnt. 2 Vol. 3B 23-151).

The decision below creates a dangerous precedent to the extent that no property owner is safe in his rights of ownership. The plaintiffs-appellees may have represented petitioners in their right to better dividends, but under no circumstances did they have a right to claim the power to represent petitioners as to the latter's ownership of their Class B stock, so as to bargain away for an arbitrary dollar amount, without right for evaluation, petitioners' property rights in their stock. (Cf. A38-39).

A serious and substantial misapplication of the procedural rule, 23(e) F.R.C.P., is involved here, and must be

corrected. Otherwise, large and powerful corporations can freely start a class action on one claim, corralling all the small stockholders into a box canyon, as it were, and then force a settlement upon the captive stockholders, which so called settlement has nothing to do with the original claim, and for which there could be no claim. But more dangerous and unfair is, that on the pretext of representing others on one issue, the class representatives switch their target and claim the right to bargain away, without evaluation, the property rights of the stockholders, which property rights were never in issue or jeopardy in the initial suit.

This honorable Supreme Court, must, in the interest of the basic right of our citizens to own property, and not to have that property taken away without due process of law, grant this petition and hear this case.

Answer to Question #2

This Honorable Court held in the case of *Zahn* v. *International Paper Co.* [414 U.S. 291 (1973)] that in a spurious type class suit, wherein jurisdiction was based solely on diversity of citizenship, [28 U.S.C. 1332(a)], each and every member of the class must have at stake in the controversy the $10,000 jurisdictional amount.

In the action below for better dividends, the jurisdiction of court, despite anything said to the contrary, was based solely on diversity of citizenship of the parties. The plaintiff-appellees' complaints, both original and amended, so state diversity as the sole base of jurisdiction of the District Court. [Cf. paragraph #3 of Alleghany's complaint, amended as late as July 14, 1972, four years after the action was declared a class action, and a few months before the stipulation of settlement dated Dec. 18, 1972].

It is respectfully submitted, that even if plaintiffs-appellees attempted to change the basis of jurisdiction by an amended complaint four years after the action was declared a class action, the represented class should have been notified under Rule 23 F.R.C.P., which they were not.

In paragraph #48 of Alleghany's amended complaint, (last paragraph), a general allegation is made that defendants-appellees conduct was "in violation of state and federal statutes (including section 10(b) of the Securities Exchange Act of 1934) and their common law fiduciary duty." Alleghany did not claim this as the base of jurisdiction for the District Court, and the Court in its opinion of March 19, 1973, approving the settlement agreement stated: "it is interesting to note that plaintiffs do not seek separate relief on their 10b-5 claim: instead they urge that the damages be measured by the amount of reasonable dividends withheld by defendants during 1964-1971" (59 FRD 353, 365; *infra* A32).

Just as the record clearly shows the sole basis of jurisdiction below was diversity, the record will also show that the petitioners, as owners of 5 and 2 shares respectively of Class B Mo Pac stock, (76.1% of all the owners of Class B Mo Pac stock owned 10 or less shares each), could never, by any stretch of the imagination, have an interest in the controversy which would meet the $10,000 jurisdictional requirement, and should have been permitted to opt out, or have their stock evaluated.

It is respectfully submitted that, by virtue of the Zahn doctrine, (*supra* p. 11), the District Court below lacked jurisdiction over the appellants, and other Class B Mo Pac stockholders in similar position and that the Circuit Court of Appeals 2nd Circuit erred in affirming the District Court's judgment of April 8, 1974 based on the District Court's opinion (A16-A46).

Answer to Question #3

(a & b) The opinion of the District Court approving the settlement agreement, March 19, 1973 [A16], and affirmed by the 2nd Circuit [A47], no matter how well intentioned, was a nullity because it exceeded the adjudicatory power of the court, constituted business advice and not the resolution of a *case or controversy.*

The judgment attempted to order a recapitalization of Mo Pac for which there could be no claim in litigation, and for which plaintiffs-appellees made no claim in their suit. To accomplish these terms, the District Court wrongfully vested plaintiffs-appellees with rights and power over petitioners property in their Class B Mo Pac stock, and wrongfully and arbitrarily determined the settlement value of said shares of stock, without opportunity to have its true value determined by due process proceeding. By what principle of law could plaintiffs-appellees be given such right over another persons property? No principle that accords with the American Constitution and Jurisprudence exists to justify this abuse of power under the guise of judicial authority.

(c) The financial self interest of Alleghany made it impossible for Alleghany to properly represent the petitioners.

This self interest was unknown to petitioners and to the District Court at the time of the so called recapitalization settlement of the suit below, and the District Court placed great weight on that fact that Alleghany owning 53% of the Class B Mo Pac stock, was willing to settle at the low price of $2,450 per share, (59 FRD 353, 366; A41).

In October, 1973, when Alleghany filed a brief with the I.C.C., seeking approval of the Court ordered Mo Pac recapitalization, it was revealed for the first time that

Alleghany's Mo Pac stock was and had been "continued subject to the continuing jurisdiction of the Commission" (Alleghany Corporation Control and Purchase of Jones Motor Co. Inc. —— and Control Erie Trucking Company No. M.C.-F-10444, 109 MCC 333, 350, decided January 27, 1970).

Alleghany should have disclosed this fact to the Court below, and to petitioners and others, and have obtained the permission from the I.C.C. first, as a condition precedent to starting the law suit below, rather than a condition subsequent.

It appears that it was in Alleghanys' interest to jettison its Class B Mo Pac stock in bulk at any cost. Such an interest was contrary to that of petitioners and other individual B stockholders.

To see the full self serving interest of Alleghany in disposing of its Mo Pac B stock at any cost, and the tax benefits to be derived from avoiding a 70% penalty tax by being under the authority of the ICC rather than the SEC, one must read not only the *Jones Motor Case* (supra p. 14), but the *Staff Study for the Special Subcommittee on Investigations of the Committee on Interstate and Foreign Commerce House of Representatives, (92nd Congress)*, entitled *"Inadequacies of Protection For Investors in Penn. Central and Other ICC-Regulated Companies.* (U.S. Gov't Printing Office 1971, 59-2070, pp. 36-38). Alleghany controls a 6 billion dollar mutual fund complex—Investors Diversified Services, the largest mutual fund in the United States—yet is under the ICC jurisdiction rather than SEC.

Alleghany, in its October 1973 brief to the ICC, boasted as follows: "Clearly an excellent procedure" (referring to the recapitalization of Mo Pac) "for eliminating or

virtually eliminating Alleghany's ownership of Mo Pac B stock is that embodied in the Plan of Reorganization."

An excellent plan for Alleghany, with excellent benefits, but only by means of taking control without legal authority and at the cost of the private property of petitioners and other small investors.

The judgment denying petitioner Moumousis motion, [A14], gives an improper basis for denial when it states that Alleghany's "stock was subject to a voting trust" [which] "was known to the Court." [A14]. Everyone knew that Franklin National Bank was the voting trustee for Alleghany. What Moumousis moved the Court on was that he and other Class B Mo Pac stockholders did not know that Alleghany's stock was under the continuing jurisdiction of the I.C.C., and that Alleghany for private financial interests, and the I.C.C., from an administrative standpoint, were anxious that Alleghany dispose of the Mo Pac stock in bulk, and "The Commission was undoubtedly aware that the sale of Alleghany's B shares in the usual way was simply impossible, . . ." (Record Below p. 10; Alleghany's October 1973 brief to ICC).

In other words to the District Court, S.D.N.Y., Alleghany was the champion representative of all the small individual stockholders. Yet later Alleghany, to the I.C.C., buried this role and obligation and sought I.C.C.'s blessing on the basis that a bulk bargain sale was good for the public interest. Some might call this perfidity.

Answer to Question #4

a) On July 2, 1974 the Federal District Court, S.D.N.Y., by judgment, awarded, to the attorneys for Levin and LeVasseur, fees in the amount of $1,750,000, plus $22,422.06 for disbursements, for their services below and those ren-

dered in a prior concluded case of *Levin* v. *Mississippi River Fuel Corp.* (386 U.S. 162; 1967).

Petitioners protested such an award for alleged services in a different, concluded, prior case on several grounds, particularly on the ground that the application by said attorneys for said fees was denied under the case of *Missouri Pac. R. Co.* v. *Slayton* (407 F.2d 1078) and by the U.S. Court of Appeals, 8th Circuit, thus constituting *res judicata* or at the very least the doctrine of the *law of the case.*

No showing was made below, by the attorneys seeking reimbursement, that the prior case was necessary or related to the initial suit below, or that the parties, (such as petitioners and others), were party to the prior suit.

If ever there was an example of over-reaching in the delicate area of responsible representation in class actions this case so constitutes, in the opinion of petitioners, a classic example. Not only is their property taken away without their consent or any opportunity for appraisal, but the attorneys are awarded fees which a Circuit Court previously refused to award them in a different case entirely.

In fairness this Court must act to protect the individual investor from such over-reaching by large and powerful corporations.

b) By Section 7.10 of the stipulation of settlement, the court below approved that the allowance for fees and expenses should be made only "after such final judgment is no longer subject to appeal." (Cf. A45).

On July 3rd, 1974, and even to the present time there was and still is pending three appeals, known as: *James Gabriel pro se* v. *U. S. of America, I.C.C.*, U.S.F.D. Ct. N.J. 74-471;

Vaini pro se v. *U. S. of America and the I.C.C.*, U.S.F.D. Ct., N.J. 74-470; *Wesson pro se* v. *U. S. of America and the I.C.C.*, U.S.F.D. Ct., N. J. 74-469. The Court below abused its own judgment.

For the Courts below to determine fees, prior to the resolution of these appeals, and contrary to the settlement agreement is obviously a violation of due process and adjudicatory power. The attorneys seek to get paid before the case is terminated, in fear that this Honorable Court will accept this case, and, by reversal, right the great wrong which has been done to these petitioners and other small stock owners of Class B Mo. Pac. stock.

Conclusion

How can the judgments of the courts below be defended and upheld, and long be tolerated by the citizens of this great Republic, when by the procedural device of a class action a gigantic, wealthy and powerful corporation, Alleghany, given limited authority to represent small stockholders in a Federal suit for better dividends, abandons its trust and the suit, and by aid of a court judgment usurps and claims such ownership rights over the private property of the represented stockholders, as to sell, at an arbitrary price, the stock of the represented without providing the said represented stockholders the right to opt out, or the right, in basic fairness, to have their own stock evaluated for its true and not settlement value under the Agreed Plan of Reorganization of 1954 of Mo Pac (Finance Docket 9918—290 I.C.C. 477).

The questions posed, including the lack of the court's jurisdiction, including the answers given above, clearly show that a grave unjustice has been done these petitioners by the judgments below.

More importantly, on a natural national scale, the holdings below constitute a most dangerous precedent for the abuse of federal procedure to undermine the sacred substantive right of the owner of private property to be secure, under the Constitution and the Laws of the United States, in his ownership.

For these reasons, and the others set forth in the petition, it is respectfully hoped and prayed that this Court will recognize the importance for the country of the questions involved, and will see fit to grant to the petitioners a writ of certiorari.

Dated: Brooklyn, New York
March 15, 1975.

Respectfully submitted,

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(212) 508-0009

Certificate of Service

I, Gerard M. Carey, Counsel to Petitioners, do hereby certify that 3 copies each of the above and foregoing Petition for Certiorari, together with Appendix, has been deposited in the United States Mail, postage prepaid, on this the 15th day of March, 1975, to the following addressees:

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APPENDIX

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

74-2172—74-2231—74-2104

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of December one thousand nine hundred and seventy-four.

Present:

HON. HENRY J. FRIENDLY,
HON. WILLIAM H. TIMBERS,
HON. MURRAY I. GURFEIN,

Circuit Judges.

BETTY LEVIN, on behalf of herself and all other holders of CLASS B COMMON STOCK of MISSOURI PACIFIC RAILROAD COMPANY, ALLEGHANY CORPORATION and ROBERT LE-VASSEUR,

Plaintiffs-Appellees,

—v.—

MISSISSIPPI RIVER CORPORATION, MISSOURI PACIFIC RAILROAD COMPANY, ROBERT H. CRAFT, T. C. DAVIS and THOMAS F. MILBANK,

Defendants,

MICHAEL MOUMOUSIS, NAPOLEON C. GABRIEL, JACOB R. COHEN, JUNE COHEN,

Defendants-Appellants.

Judgment

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the orders and judgment of said District Court be and they hereby are affirmed with costs to be taxed against the appellants.

A. Daniel Fusaro,
Clerk.

By Vincent A. Carlin,
Chief Deputy Clerk.

Opinion of District Court

BETTY LEVIN et al., Plaintiffs,

v.

MISSISSIPPI RIVER CORPORATION et al., Defendants.

No. 67 Civil 5095.

United States District Court, S. D. New York.

June 26, 1974.

EDWARD WEINFELD, *District Judge.*

This is the final stage in the settlement of these consolidated class actions; hopefully, the closing chapter in the controversy and litigations in which the Class A and Class B shareholders of the Missouri Pacific Railroad Company ("MoPac") have been embroiled for almost two decades. Familiarity is assumed with this court's opinion approving the terms of the settlement,[1] as well as with the related litigation which established the voting rights of the Class B stock.[2] The notices sent to stockholders of the hearing upon terms of the proposed settlement also set forth the applications by attorneys for allowances and that their consideration would be deferred until after entry of final judgment. The settlement pursuant to the final judg-

[1] Levin v. Mississippi River Corp., 59 F.R.D. 353 (S.D.N.Y.), aff'd on opinion below sub nom. Wesson v. Mississippi River Corp., 486 F.2d 1398 (2d Cir.), cert. denied, 414 U.S. 1112, 94 S.Ct. 843, 38 L.Ed.2d 739 (1973).

[2] Slayton v. Missouri Pac. R. R., 233 F.Supp. 747 (E.D.Mo. 1964), rev'd sub nom. Mississippi River Fuel Corp. v. Slayton, 359 F.2d 106 (8th Cir. 1966), rev'd sub nom. Levin v. Mississippi River Fuel Corp., 386 U.S. 162, 87 S.Ct. 927, 17 L.Ed.2d 834 (1967).

ment has been fully consummated. The matter now before the court is the application of plaintiff Alleghany Corporation for reimbursement of fees paid by it for legal, expert and consultant services; also, the application of attorneys for plaintiffs Levin and LeVasseur for allowances for their services, plus disbursements. Under the terms of the settlement the allowances awarded by the court are to be paid equally by defendants Mississippi River Corporation ("Mississippi") and MoPac.

The notice to stockholders stated that Alleghany's request for reimbursement in the sum of $850,000 would not be opposed by MoPac and Mississippi; it also stated that the Levin-LeVasseur, attorneys' application for an allowance in the sum of $6,953,000 would be opposed by MoPac and Mississippi. After the affirmance of the judgment authorizing the settlement and following approval by the stockholders and by the Interstate Commerce Commission, the interested parties, in a desire to avoid litigation on the fee issue, reached an agreement whereby the Levin and LeVasseur attorneys limited their application for fees to $2,000,000, plus disbursements of $22,422.06, which Mississippi and MoPac would not oppose.

Upon the return date of the hearing of these applications, five shareholders objected to the payment of the fees as requested, but generally their views reflected continuing objection to the settlement. Two of them, owners of Class A stock, opposed payment of fees by MoPac on the ground that only the Class B stockholders or other allied interests should be assessed the costs of the litigation. The court finds that the objections raised are without substance. The settlement, as this court noted in approving it, was of substantial value to the B stockholders; it was also of substantial value to the corporation and necessarily all its stockholders in ending the costly litigation which, had it

gone to trial, whatever its outcome, would not have ended the strife between the two classes, with continuing diversion of MoPac's officers from their essential duties in operating the railroad and advancing its other economic interests. MoPac's commitment to pay one-half the allowed fees may be considered an additional cash payment to the Class B shareholders as part of the settlement, so that what they received is on a net basis. Accordingly, the sole issue that remains is what is a fair and reasonable allowance for the services by the respective applicants.

The general factors to be considered in awarding fees in litigation of this type have recently been specified by our Court of Appeals in City of Detroit v. Grinnell Corp.,[3] and need not be enumerated in detail. Although that was an antitrust suit, the same general standards may be applied. While they serve as guides, no precise or mathematical formula is mandated; what is required is that, giving due consideration to all relevant and significant factors, the court award a sum that is fair and reasonable—one that is neither excessive nor inadequate.[4]

A preliminary word is in order. The applicants, in stressing the value of their services in terms of benefit to the Class B shareholders, refer to the $850—16 share package of new common stock for each share of old Class B stock as a conversion rate of $2,450, reflecting a gross settlement of $97,340,950 for all 39,731 shares of the old Class B stock. Thus, Alleghany, applying the $2,450 per Class B share exchange factor, notes that the average highest annual bid price for Class B shares for the period from 1965 to 1971, following the Supreme Court's ruling in

[3] 495 F.2d 448 (Mar. 13, 1974); *see* Lindy Bros. Builders v. American R. & S. San. Corp., 487 F.2d 161 (3d Cir. 1973).

[4] *Cf.* Alpine Pharmacy, Inc. v. Chas. Pfizer, 481 F.2d 1045 (2d Cir. 1973).

the voting rights case, was approximately $1,778. Based upon the 39,731 Class B shares outstanding on December 31, 1971, Alleghany argues that this amounts to an aggregate increase in the value of the Class B stock of at least $26,699,232, and stresses that its requested allowance of $850,000 is about 3% of the aggregate increase in the value of the Class B stock. The Levin-LeVasseur attorneys, using the same exchange factor of $2,450, take the market value of the Class B stock after the Eighth Circuit Court of Appeals ruling (rejecting class voting rights) and just prior to the Supreme Court's granting of certiorari, $530 per share, and compute the net benefit to the Class B shareholders at $76,283,520. This conceptual theory of benefit somewhat overstates the matter. The Class B shareholders received for their shares what the court deemed a fair and reasonable equivalent on a compromise basis to put an end to continuing controversy between them and the Class A stockholders—a settlement that offered "a permanent solution to the longstanding impasse."[5] This was no recovery of a cash fund or securities which gave the shareholders something of value they did not already own. They were exchanging stock already in hand for other stock of a different class plus cash on a basis deemed to be fair and reasonable in the light of the respective rights of the two groups of litigants, the strength and weaknesses of their respective positions, the probabilities of ultimate success upon a trial, and an evaluation of the terms of the settlement compared with the likely benefits in the event of success upon a trial. However, rejecting the applicants' theory in no respect diminishes the value of their services in achieving a favorable settlement with its consequent and

[5] Levin v. Mississippi River Corp., 59 F.R.D. 353, 373 (S.D.N.Y. 1973).

anticipated benefits to the corporation and its stockholders. On the basis of the sixteen shares received by the Class B stockholders, their annual dividends at $5 per share will be $80 instead of the $5 previously declared; also the marketability of the common shares is improved and the settlement is net to each shareholder. Other benefits are set forth in the court's opinion approving the settlement. Indeed, the simple fact is that the settlement achieved more for the Class B stockholders than if they had been successful in the litigation, since it at once removed the root cause of their continuing controversy, whereas even success in litigation would not have brought about that result.

The principal thrust of the plaintiffs' claims was directed toward MoPac's restricted dividend policy and the relief sought included the declaration of additional dividends in prior years and increased dividend distribution in the future. The issues raised by the defense required not only legal services of a high order, but the advice and assistance of certified public accountants, investment analysts and railroad economists. The pretrial discovery and preparation for trial involved the study of the complex history of MoPac's reorganization, including analysis of the various ICC opinions relating to the several proposed plans, the voting rights litigation, and relevant accounting principles, and evaluation of volumes of corporate financial data of defendants' and other railroads.

The discovery process, of necessity, was extensive. It encompassed not only depositions of witnesses, but the preparation of meaningful interrogatories and exhaustive inspection and investigation of defendants' files in an effort to obtain documentary support for plaintiffs' contentions, including the allegations of conspiratorial conduct to withhold dividends in order to depress the price of the Class B

stock. The importance of dredging up meaningful information to establish the plaintiffs' claims necessarily required the services of senior rather than associate attorneys in the deposition discovery process. The negotiations leading to the settlement, which at times appeared impossible of achievement, were prolonged and were consummated only on the eve of trial when the attorneys were fully prepared, on the basis of their pretrial activities, to proceed to trial. After the settlement was reached, the attorneys expended considerable time in meeting objections to its approval, and after its approval, in seeking to uphold it in the Court of Appeals and before the ICC, and also thereafter in effectuating its terms.

ALLEGHANY'S APPLICATION

This action was commenced by plaintiff Levin in December 1967. Alleghany intervened by leave of court, as did plaintiff LeVasseur. The action was ordered to be maintained as a class action on behalf of all Class B stockholders. Allegheny was the largest Class B stockholder, owning 53%. This majority position obviously made it more than an average litigant in the protection of its interests. Alleghany's attorneys were Donovan, Leisure, Newton & Irvine, and in all, their fees and expenses and those for the services of other law firms, accountants and financial experts, totalled $850,000 for which Alleghany seeks reimbursement.

Alleghany's attorneys expended a total of 14,312½ hours in the prosecution and settlement of the action, which included those of senior partners and associates billed at rates charged by that firm and others of similar standing, and totalling $680,234.68. Upon the hearing a senior partner testified that since the onset of the litigations the

attorneys had agreed to bill Alleghany at the rate of $65 per hour for partners' time and $40 per hour for associates' time, averaging $47.50 per hour.[6] The attorneys' disbursements amounted to $59,712.20, or a grand total for Alleghany's attorneys' fees and expenses of $739,946.88, most of which Alleghany has already paid and has agreed to pay the balance. In addition, to assist in the prosecution and settlement of the action, the attorneys retained the services of other law firms, a certified public accountant, and management, transportation and economic consultants, whose charges they certified as fair and reasonable, and which totalled $110,053.12, which Alleghany has paid. Thus, the total paid or owed by Alleghany for all services is $850,000.

The sum requested, measured by any applicable standard—whether the benefits conferred upon the class, the importance of the litigation to the public, the complexity, magnitude and difficulty of the case, the hours expended by lawyers, their status and standing at the bar or the rates charged—is fair and reasonable, if not on the modest side. Alleghany's application for reimbursement in the sum of $850,000 is granted.

APPLICATION OF ATTORNEYS FOR LEVIN AND LEVASSEUR

Plaintiffs Levin and LeVasseur were substantial owners of Class B stock. Plaintiff Alleghany, as the majority owner of the Class B stock, had a veto power over corporate action that required the separate approval of the Class B stock; accordingly, independent representation of the minority Class B group was fully justified. In addition to the principal class action claims with respect to MoPac

[6] At the hearing objectants were afforded an opportunity to cross-examine the attorneys who testified as to their services.

dividend policy, the Levin-LeVasseur group asserted derivative claims on behalf of MoPac. Orans, Elsen & Polstein represented plaintiff Levin, and Pomerantz, Levy, Haudek & Block represented plaintiff LeVasseur, but they cooperated and their application is a joint one.[7]

While in some measure the activities of the Levin-LeVasseur attorneys and Alleghany's ran a parallel course, in other respects it did not; in any event, the attorneys acted independently in espousing the interests of the Class B minority group.[8] They also represented minority Class B interests in the Missouri action which determined the voting rights of the Class B stockholders. The attorneys request an allowance of $2,000,000, reduced from their original request of $6,953,000, as noted above, and $22,422.06 for disbursements. These applicants urge that since MoPac and Mississippi are obligated to pay any fee award, their agreement not to oppose the reduced application, particularly in view of their opposition to the originally requested amount, affords strong assurance of its reasonableness and accordingly should be given great, if not decisive, weight. However, to accept as conclusive the parties' agreement as to fees in a class or derivative action would mean the surrender of the court's duty and its discretion. The agreement, while it may have some relevance, does not relieve the court of its duty to make an independent appraisal, to "avoid awarding 'windfall fees' and . . . likewise avoid every appearance of having done so," and

[7] The application also includes services of other counsel engaged in this and related litigation, which are set forth in the affidavits in support of the requested allowances. Counsel have agreed among themselves as to the allocation of any award, so it is not necessary for the court to make a specific allocation.

[8] *See* Levin v. Mississippi River Corp., 59 F.R.D. 353, 367 (S.D.N.Y. 1973).

to award only such fees that are fair, "with an eye to moderation" [9] based upon the applicable standards.

The award is sought for services rendered over a ten-year period in this and the related predecessor actions wherein the voting rights of the Class B stock were defined.[10] The effectiveness and skill of the attorneys who espoused the interests of the Class B stockholders are attested to by the settlement itself. They are of considerable experience in class and derivative stockholder litigation, and their expertise was brought to bear in the instant case on behalf of their clients. Because of the magnitude, complexity and importance of the issues, the lawyers who participated in the various aspects of the litigation in the main were senior attorneys. They were opposed by eminent and able attorneys representing the defendants. The pretrial procedures were conducted with conspicuous ability and were of signal importance in achieving the settlement. The services of the Levin-LeVasseur attorneys were rendered on a wholly contingent basis and, unlike the Alleghany attorneys, no payment to date has been made to any of them. The total time expended by these attorneys, principally the seniors, was 11,083¼ hours. However, this is but one factor, and in this court's view only of relative importance in the instant case.

Upon the hearing of these applications the court questioned whether the portion of the time and the services rendered in the voting rights action which reached the Supreme Court were compensable in this action. After

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[9] City of Detroit v. Grinnell Corp., 495 F.2d 448, at 469-470 (2d Cir. 1974).

[10] Slayton v. Missouri Pac. R.R., 233 F. Supp. 747 (E.D.Mo. 1964), rev'd sub nom. Mississippi River Fuel Corp. v. Slayton, 359 F.2d 106 (8th Cir. 1966), rev'd sub nom. Levin v. Mississippi River Fuel Corp., ?? U.S. 162, 87 S.Ct. 927, 17 L.Ed.2d 934 (1967).

reflection I am satisfied that they are, since the right of the Class B stock to vote separately was the basis and hard core of this litigation. Indeed, the settlement of this action could only have been achieved because of the successful conclusion of the voting rights suits.[11] The effective veto power of the Class B stock obviously was a principal factor in bringing about the settlement. The fact that the attorneys' applications for fees in the Missouri action were not allowed does not foreclose granting allowances for such services. The Eighth Circuit Court of Appeals, which reversed the district court ruling which did grant them fees, acknowledged "[i]t is undisputed that the Class B stockholders obtained a very substantial benefit from the litigation they instituted and won," [12] but noted that "the right of the named plaintiffs and their attorneys to make a pro rata recovery of fees and expenses against the Class B stockholders . . . is not directly before us in this case," [13] and finally that any benefit to MoPac was only incidental to the main litigation which did not create a new fund for the corporation or the preservation of assets so as to warrant an allowance. Thus the request for special services is proper in this action, which may be considered a companion or related one.

It is at once apparent that these attorneys, on the basis of less hours than those expended by Alleghany's attorneys, are seeking a substantially higher allowance. The services of that firm in achieving the settlement were of equal value to those of the Levin-LeVasseur

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[11] *Cf.* Angoff v. Goldfine, 270 F.2d 185 (1st Cir. 1959).

[12] Missouri Pac. R.R. v. Slayton, 407 F.2d 1078, 1081 (8th Cir.), cert. denied, 395 U.S. 937, 89 S.Ct. 1998, 23 L.Ed.2d 451 (1969).

[13] *Id.* at 1082.

group. However, as was pointed out at the hearing, and as is the fact, Alleghany's attorneys had a paying client; they received and would receive payment from their client no matter what the outcome of the litigation. These attorneys, however, faced the prospect of no compensation for almost ten years of extensive and conspicuous services if they did not prevail in this action. The success of the suit, with its thrust directed toward the dividend policy, which centered on the business judgment of directors, obviously could not be foretold—as this court suggested, at best the probability of ultimate success upon a trial could only be one of "cautious prophecy." [14] Taking into account the difficult and complex problems inherent in the litigations, the total results achieved for the class, the benefit to MoPac, the skill and experience of the attorneys, the hours expended by senior and associate attorneys at prevailing rates, the high caliber of opposing counsel, the risk of no compensation or recovery of expenses in the event of nonrecovery, the court deems $1,750,000 as fair and reasonable. These counsel are also entitled to reimbursement for disbursements in the sum of $22,422.06.

Judgment may be entered accordingly.

[14] Levin v. Mississippi River Corp., 59 F.R. 353, 366 (S.D.N.Y. 1973).

Memorandum Opinion of District Court Denying Motion of Michael Moumousis

That the Alleghary stock was subject to a voting trus was known to the Court. It was specifically referred to i the Court's opinion and also alluded to by counsel repre senting stockholders at the hearing on the settlement pro posal and in briefs and affidavits submitted with respec thereto. In effect, this movant, who did not appear at th hearing, is seeking a reargument of the issues.

The motion is denied.

Dated: New York, N. Y.
December 5, 1973

/s/ Edward Weinfeld
United States District Judg

Memoradum Opinion of District Court Denying Motion of Napoleon C. Gabriel

This motion is without merit. The holding and relation of Zahn v. International Paper Co., 42 U.S.L.W. 4097 (U.S., Dec. 17, 1973), is applicable to class actions under Fed. R. Civ. P. 23(b)(3); as plaintiffs correctly point out, this suit was certified as a class action under Fed. R. Civ. P. 23(b)(1) and (2). Further, jurisdiction for this action was grounded on section 27 of the Securities Exchange Act of 1934, 15 U.S.C. section 78aa (1970), and pendent jurisdiction. *See* Levin v. Mississippi, 59 F.R.D. 353, 359-60 (S.D. N.Y. 1973). Section 27 does not require a minimum amount in controversy, and *Zahn* is not applicable to suits brought thereunder. *See* Zahn v. International Paper Co., 42 U.S. L.W. 4087, 4091 n. 11 (U.S., Dec. 17, 1973). Finally, after the Supreme Court had denied certiorari in the instant case, the petitioner applied for a rehearing based on the *Zahn* case, and the petition was denied.

Dated: New York, N. Y.
April 8, 1974

/s/ Edward Weinfeld
United States District Judge

Opinion of Edward Weinfeld, D. J.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

67 CIVIL 5095

BETTY LEVIN, ALLEGHANY CORPORATION and ROBERT LEVASSEUR,

Plaintiffs,

against

MISSISSIPPI RIVER CORPORATION, MISSOURI PACIFIC RAILROAD COMPANY, ROBERT H. CRAFT, T. C. DAVIS and THOMAS F. MILBANK,

Defendants.

EDWARD WEINFELD, D. J.

This is a motion pursuant to Rules 23 and 23.1 of the Federal Rules of Civil Procedure for approval of a settlement agreement of a class action brought on behalf of Class B stockholders of the Missouri Pacific Railroad Company (MoPac), an interstate railroad. The plaintiffs in the class action are Alleghany Corporation (Alleghany), the owner of a majority of the outstanding shares of Class B stock, and two individual owners of such stock, Betty Levin (Levin) and Robert LeVasseur (LeVasseur), who also assert derivative claims on behalf of and in the right of MoPac. The defendants include Mississippi River Corporation (Mississippi), the owner of a majority of the outstanding Class A stock of MoPac, and three individual defendants, directors of MoPac, two of whom are also directors of Mississippi. In the event the proposed settlement is approved, applications for allowance of attorneys' fees and expenses are to be considered following entry of final judgment.

HISTORICAL BACKGROUND OF THE CLASS A AND CLASS B STOCK

The capitalization of MoPac has been the subject of controversy and litigation for almost forty years. The Class A and Class B stockholders have been at odds over their respective rights and interests over a substantial period. Their differences were accentuated by MoPac's restructured capitalization when in 1956 it emerged from reorganization proceedings filed in 1933. During those twenty-three years various proposed plans of reorganization failed to gain acceptance. Alleghany Corporation, the owner of about half of MoPac's then outstanding common stock, had opposed reorganization plans proposed in 1940, 1944 and 1949 because none provided for the old common stockholders. Finally, a fourth plan, referred to as an "Agreed System Plan," was proposed by the reorganization Trustee, approved by the Interstate Commerce Commission in 1954, accepted by Alleghany and other interests, and became effective March 1, 1956.[1] The plan, which then seemed to be an ingenious way to compose differences among various security and equity interests, contained provisions which some objectors predicted "are sure to cause trouble."[2] And so it has come to pass. Missouri Pac. R. R. Reorganization, 290 I. C. C. 477, 624-25 (1954). The equity interests have been at odds and in litigation ever since.

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[1] Missouri Pac. R. R. Reorganization, 290 I. C. C. 477 (1954), *approved in In re* Missouri Pac. R. R., 129 F. Supp. 392 (E. D. Mo.), *aff'd sub nom.* Missouri Pac. R. R. 5¼% S. S. B. C. *v.* Thompson, 225 F. 2d 761 (8th Cir. 1955), *cert. denied,* 350 U. S. 959 (1956).

[2] *In re* Missouri Pac. R. R., 129 F. Supp. 392, 397 (E. D. Mo. 1955). ICC Commissioner Mahaffie was the first to predict trouble ahead. In his reluctant concurrence of the reorganization plan, he said:

> "The prior class 'A' stock is limited as to dividends and is noncumulative. It will be largely of a speculative character for some years at best. But the 'B' stock is for the present, and for the foreseeable future, principally valuable as a token for speculation. Consequently, its relation to the 'A' stock and to the debentures and income bonds which precede it is reasonably sure to cause trouble."

MoPac's recapitalization upon its reorganization was structured so that the old preferred and common stock were replaced by two classes of stock, Class A and Class B. The Class A shares of the reorganized company were issued to the former preferred stockholders of MoPac, the debtor, with each share *entitled to* receive, when and as declared by the Board of Directors, noncumulative dividends, not to exceed $5 annually, and in the event of dissolution or liquidation, the first $100, together with any dividends declared and unpaid. The Class B shares were issued to the former common stockholders of the debtor, and after payment of the $5 dividend to the Class A stock, each share of Class B stock is entitled to receive dividends, without restriction, as the Board of Directors may declare, and upon liquidation or dissolution of MoPac, the equity in excess of the Class A preferences. Each share of each class is entitled to one vote. The former preferred stockholders received approximately 1.9 million shares and the former common stockholders received approximately 40,000 shares, so that 98% of the voting stock is held by the Class A stock and 2% by the Class B stock.

Obviously, the Class A stockholders have the power to elect MoPac's Board of Directors, as well as voting control with respect to other but not all corporate matters. On mergers, consolidations or reorganizations involving issuance of additional stock or the alteration of the rights of either class, approval by a majority of each class is required. Thus, in effect, the Class B stock has a veto power over such actions. In practical terms, the "ingenious" solution envisaged under the 1956 reorganization created a basic conflict between the two classes, with the equity ownership principally in the B stock, but with effective operating control in the A stock.

Mississippi began acquiring Class A stock in 1959 and by 1963 owned more than one million shares, constituting 58% of the outstanding Class A shares. It now owns 63%, or 1,158,395 shares out of a total outstanding of 1,864,052. Since 1963 it has elected the Board of Directors of MoPac. Alleghany, on the other hand, which has owned a majority of the outstanding Class B stock ever since it was issued upon the reorganiza-

tion, now owns, subject to a voting trust, approximately 53%, or 21,243 shares, of the total outstanding 39,731 shares. Thus the disparity of interest between the two classes of stock is further aggravated by Alleghany's majority ownership of the B stock, which gives it an independent veto power over any corporate action that requires the separate approval of the B stock.

The Voting Rights Litigation

The first litigation that the differing stockholders became embroiled in after the reorganization came in December 1963, when MoPac's Board of Directors proposed the consolidation of MoPac and its 83% owned subsidiary, Texas and Pacific Railway Company (T&P), into a new corporation, Texas and Missouri Pacific Railroad Company (T&M). An application was filed with the Interstate Commerce Commission for an order under section 5(2) of the Interstate Commerce Act authorizing the proposed consolidation and for the issuance of securities by T&M under section 20a of the Act. The plan provided for an exchange of each MoPac share, regardless of class, for four shares of the new corporation and for an exchange of the T&P stock (other than that owned by MoPac) on the basis of one share of T&P for 4.8 shares of the new company. MoPac's Board of Directors took the position that the Class B stockholders were not entitled to vote on the plan separately and apart from the Class A stockholders, and that it intended to submit the plan for approval to the collective vote of the Class A and Class B stockholders. In view of Mississippi's ownership of a majority of the Class A stock, as well as all outstanding stock, the outcome of the vote on consolidation was virtually foreordained. Alleghany and other Class B stockholders filed actions in the United States District Court for the Eastern District of Missouri for a declaratory judgment that the plan required the approval of a majority of each of the two classes of stock and sought other relief. Upon a limited consolidation of the cases the district court held that MoPac's Articles of Association and the applicable federal and state law required the separate ap-

proval of each class of shareholders.[3] The Court of Appeals reversed, holding that separate class approval was not required.[4] On certiorari, the Supreme Court unanimously reversed the Court of Appeals, holding that:

> "With reference to voting rights, we hold only that in a consolidation as proposed here, Missouri law must be applied and . . . that law requires the application of the Articles of Association of MoPac, which in turn, require the assent of the majority of the shareholders on a separate class-vote basis."[5]

Since a number of stockholders emphasize certain rhetorical statements in the Court's opinion,[6] it is well to bear in mind the Court's precise holding, and further its statement: "We do not . . . reach the merits of the proposed plan. . . ."[7] The Court's ruling ended the proposed consolidation when in March 1967 MoPac and T&P abandoned their plan, but further litigation was ahead.

The Instant Action

This action was instituted by plaintiff Levin in December 1967. Thereafter Alleghany and LeVasseur intervened pursuant to leave granted by this Court. In September 1968 Judge Bryan ordered that the action be maintained as a class action on behalf of all Class B stockholders. The thrust of the complaints of all three plaintiffs is directed toward the dividend policy with respect to the Class B Stock. From 1964 to 1971 the annual dividends paid on the A stock have been $5 per share. During that same

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[3] Slayton *v.* Missouri Pac. R. R., 233 F. Supp. 747 (E. D. Mo. 1964).

[4] Mississippi River Fuel Corp. *v.* Slayton, 359 F. 2d 106 (8th Cir. 1966).

[5] Levin *v.* Mississippi River Fuel Corp., 386 U. S. 162, 170 (1967).

[6] *See, e.g., id.* at 169: "The plan proposes to exchange four shares of stock of T&M for one share of MoPac Class B, which . . . is like exchanging four rabbits for one horse."

[7] *Id.* at 170.

period annual dividends declared and paid on the Class B stock have been $5 per share.

In substance, three separate claims are asserted against Missippi and the three individual defendants.[8] Under the first cause of action plaintiffs claim that the dividends declared and paid by MoPac have been unreasonably low; that Mississippi has misused its majority voting stock power by causing MoPac's Board of Directors to limit dividends on the Class B stock to $5, the maximum permissible per share dividend payable on the Class A stock, despite the enormous differences in the equity value between the two classes, and notwitstanding the availability in each year of net income for increased dividends after meeting the requirements on the Class A stock.

The second cause of action charges a conspiracy by Mississippi and members of MoPac's Board of Directors to "freeze out" the Class B stockholders by improperly limiting the dividends paid on the Class B stock, making public statements denigrating the market value of the Class B stock, and attempting to appropriate the equity of the Class B stockholders through the plan of consolidation of MoPac with T&P, proposed in 1963.

The third cause of action further alleges that the various acts and conduct alleged in the second cause of action were in violation of section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5, promulgated thereunder, and of defendants' common law fiduciary duty owed the Class B stockholders. The plaintiffs seek judgment that the Court direct MoPac to pay reasonable dividends for the past years, from 1964 to 1971, to all Class B stockholders; that MoPac be directed to pay reasonable dividends on the Class B stock in the future; and to award plaintiffs their costs, expenses and reasonable counsel fees incurred in the prosecution of this action.

In addition to the class action claims, Levin and LeVasseur separately assert derivative claims on behalf of MoPac. One

[8] Plaintiff Levin also attacks the failure of defendants to split the Class B stock or to take similar steps to improve its marketability; however, no specific relief is sought.

alleges that the defendants have failed to cause MoPac to replace the Class A stock with debentures or other interest bearing securities, which would materially reduce MoPac's income tax; however, as to this derivative claim, no specific relief is sought. A further derivative claim on behalf of MoPac is for the recovery of the costs and expenses incurred by it in connection with the 1963 T&P consolidation plan and the Class B voting rights action.

The defendants in their answers have denied the material allegations of the complaints and set up affirmative defenses, including, with respect to the dividend cause of action, business justification.

With the issues thus posed, the parties engaged in extensive pretrial discovery procedures commencing in 1968. The case was assigned to this Court in midyear 1972, and after a pretrial conference the trial was scheduled to commence on December 4, 1972. As the trial date approached, the litigants had virtually completed all pretrial activities, which included depositions of parties and witnesses, as well as interrogatories propounded to one another, which in due course were answered. In addition, plaintiffs had obtained, read and evaluated approximately 10,000 pages of documents from the files of MoPac and related sources. The inspection of these documents took over ninety man-days' work by plaintiffs' counsel and additional time by an accountant and securities expert, retained specially for that purpose. It is evident that the pretrial discovery on both sides was as thorough as could be and all pertinent facts exposed by the litigants in preparation for a contested trial. While engaged in concluding their expanded pretrial activities, the parties concurrently intensified efforts to effect an amicable settlement. Previously, during the pendency of this case, and even before, attempts to reach an accommodation had failed. The renewed extended negotiations were participated in not only by the lawyers representing the parties, executives and financial officers of the corporations involved, but also by independent financial analysts and investment advisers specializing in corporate and transportation finance. The negotiators recognized that central to a lasting reso-

lution of the conflict between the two stockholder interests was the elimination of the underlying cause of the strife, a result not obtainable whatever the final outcome were the case to proceed to trial, and it was this concept which led to a settlement on the basis of a restructured capitalization.

THE TERMS OF THE PROPOSED SETTLEMENT

If the settlement is approved by the Court, a Plan of Recapitalization (Plan) and a proposed Amendment to MoPac's Articles of Association are to be submitted to stockholders for their approval, to bring about the following:

(1) each share of Class A stock would be converted into one share of $5 cumulative preferred stock, with a liquidating preference of $100 per share, convertible into one share of new common after one year following ICC authorization of the issuance of new securities and redeemable at the option of MoPac for $100 per share, after December 31, 1975. This would require the issuance of 1,864,052 shares of the new stock to the present holders of the Class A stock, of which Mississippi would be entitled to receive 1,158,395 shares;

(2) each share of Class B stock would be converted into sixteen shares of new common stock and $850 cash. This would require the issuance of 635,696 shares of new common stock to the present holders of Class B stock, of which Alleghany would be entitled to receive 339,888 shares; this would require a cash payment by MoPac of $33,771,350;

(3) both preferred stock and common stock would have one vote per share;

(4) the Plan and amendment would have to be approved by 75% of the outstanding shares of each class of MoPac stock, including a majority of the shares of each class other than those held by Mississippi and Alleghany —that is, a majority of the minority stockholders of each class;

(5) the issuance of the new shares would have to be approved by the Interstate Commerce Commission;

(6) upon such approvals, Mississippi is required to make a cash tender offer to all Class B stockholders for at least 400,000 shares (approximately 63%) of the new common stock, at $100 per share, and Alleghany (but not the minority B shareholders) must tender all its new common stock (339,888 shares). If more than 400,000 shares are tendered, Mississippi may purchase the shares on a pro rata basis; this would require a cash payment by Mississippi of at least $40,000,000;

(7) all claims asserted in this action and any other claims against the defendants which are based upon or arise from any of the matters alleged in the complaints, regardless of the legal theory upon which they are based, will be dismissed with prejudice;

(8) fees awarded to plaintiffs' attorneys will be paid by MoPac and Mississippi.

If the recapitalization and tender offer are not consummated by December 31, 1973, the settlement agreement would be terminable at the option of Alleghany, Mississippi or MoPac.

Evaluation of the Settlement

The function of the Court on this application for approval of the settlement is not, as some objectors suggested at the hearing and others have since urged in their communications to the Court, to reopen and enter into negotiations with the litigants in the hope of improving the terms of the settlement to meet their respective objections; nor is the Court called upon to substitute its business judgment for that of the parties who worked out the settlement.[9] So, too, the Court is cautioned not to turn the

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[9] Schleiff *v.* Chesapeake & Ohio Ry., 43 F. R. D. 175, 178 (S. D. N. Y. 1967); Glicken *v.* Bradford, 35 F. R. D. 144, 151 (S. D. N. Y. 1964).

settlement hearing into a trial or a rehearsal of a trial.[10] To do so would defeat the very purpose of the compromise to avoid a determination of the sharply contested issues and to dispense with expensive and wasteful litigation. The Court's role is a more "delicate one,"[11] which requires a balancing of likelihoods rather than an actual determination of the facts and law in passing upon whether the proposed settlement is fair, reasonable and adequate to the Class B stockholders and MoPac.[12] This appraisal requires the Court to reach "an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated" and to "form an educated estimate of the complexity, expense, and likely duration of such litigation . . . and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Basic to this process in every instance . . . is the need to compare the terms of the compromise with the likely rewards of litigation."[13] With that guidance, we turn to the task at hand.

At the outset is the simple fact that the interests of each class of stockholders is tied up with the welfare of MoPac. Its operating efficiency and its competitive strength spell out economic success, which alone gives value to its stock, whatever the class. MoPac is in competition with a number of railroads, some of which, following trends in the industry and consistent with the

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[10] Newman *v.* Stein, 464 F. 2d 689, 692 (2d Cir.), *cert. denied,* — U. S. — (1972).

[11] *Id.* at 691; see also United Founders Life Ins. Co. *v.* Consumers Nat'l Life Ins. Co., 447 F. 2d 647 (7th Cir. 1971).

[12] *See* Zerkle *v.* Cleveland-Cliffs Iron Co., 52 F. R. D. 151, 159 (S. D. N. Y. 1971).

[13] Protective Comm. *v. Anderson,* 390 U. S. 414, 424-25 (1968). *Accord,* Newman *v.* Stein, 464 F. 2d 689, 692 (2d Cir.), *cert. denied,* — U. S. — (1972). Saylor *v.* Lindsley, 456 F. 2d 896, 904 (2d Cir. 1972). West Virginia *v.* Chas. Pfizer & Co., 440 F. 2d 1079, 1085 (2d Cir.), *cert. denied,* 404 U. S. 871 (1971). With regard to weighing the benefits of the compromise against the likely rewards of litigation, *see* Purcell *v.* Keane, 54, F. R. D. 455, 460 (E. D. Pa. 1972); Glicken *v.* Bradford, 35 F. R .D. 144, 152 (S. D. N. Y. 1964). *But cf.* Norman *v.* McKee, 431 F. 2d 769, 774 (9th Cir. 1970), *cert. denied,* 401 U. S. 912 (1971).

congressional policy of encouraging consolidation of the nation's railroads into a limited number of systems,[14] have merged with other lines to effect economies and to improve efficiency. Other competitors are in the process of effecting consolidations. These merged, and the likely to be merged, competitors pose a potential threat to MoPac by depriving it of all but its short haul market and in other respects—as MoPac's chief executive officer states, "[it] could prove competitively ruinous." There can be little doubt that to maintain its competitive strength it is imperative that MoPac link itself with another system. Yet its efforts in this direction have been thwarted because of the disparate interests of the two classes of shareholders. Specific instances have been cited where other railroads have shied away from proposed consolidations because of the stockholders situation.

MoPac, to protect its competitive position against merged and other competing lines, has purchased through the years controlling securities of other railroads, a matter discussed hereafter. However, the stock acquisition method does not yield all the advantages of a merger. The elimination of the present capital structure with its built-in conflict between the two classes, which has foreclosed merger to date, will permit MoPac's officials to pursue merger prospects; it will also permit its officials to function full time in its interests and its stockholders'—thousands upon thousands of hours have been devoted to litigation instead of to railroad operations.[15]

Another benefit favoring the settlement is that it provides the effective means for payment of greater dividends and thus meets in part the demands of plaintiffs. The Board of Directors anti-anticipates that the annual dividend rate will be $5 per share on each class of stock to be issued under the Plan. With the Class

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[14] *See* Penn Central Merger and N. & W. Inclusion Cases, 389 U. S. 486, 492 (1968); *see also* N. Y. Times, Feb. 16, 1973, at 1, col. 7.

[15] *Cf.* Denicke *v.* Anglo Cal. Nat'l Bank, 141 F. 2d 285, 288 (9th Cir.), *cert. denied*, 323 U. S. 739 (1944), Derdiarian *v.* Futterman Corp., 38 F. R. D. 178, 181 (S. D. N. Y. 1965).

B stockholders receiving sixteen shares of new stock for their present one share (in addition to the $850 cash), the dividend return will be $80 per annum as against the current $5 per share. Mississippi, committed to the purchase of at least 400,000 shares of the new common stock (apart from such additional common stock it may own by reason of conversion of its preferred after one year) would have an economic interest in the declaration of dividends on the new common stock.

Other advantages are evident. The conversion of the Class B stock into sixteen shares makes them more marketable and to this extent meets the derivative claim that the defendants failed to split the Class B stock, thereby broadening public interest in it. Additionally, at the present time the Class B stock elects no directors. Under cumulative voting the new common stock would have the means of representation on the Board of Directors.

We next consider a, if not the, most important factor—the probability of plaintiffs' success upon a trial, and, if successful, "the likely rewards of [the] litigation." The extensive pretrial discovery conducted by the parties has exposed their respective strengths and weaknesses.[16] While each litigant professes confidence in his cause, it is with recognition of the force of a countervailing position and also, as all are aware, that "[s]tockholder litigation is notably difficult and unpredictable."[17]

Plaintiffs have the burden of proof as to their claims. To prevail, they must establish under the allegations of their complaints that MoPac's Board of Directors, in subservience to the wishes of Mississippi, abused their discretionary powers and arbitrarily and unreasonably withheld dividends in each year, although MoPac's condition warranted such additional divi-

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[16] *Cf.* Saylor *v.* Lindsley, 456 F. 2d 896, 901 (2d Cir. 1972); Cherner *v.* Transitron Electronic Corp., 221 F. Supp. 48, 51 (D. Mass. 1963).

[17] Zerkle *v.* Cleveland-Cliffs Iron Co., 52 F. R. D. 151, 159 (S. D. N. Y. 1971); *cf.* Ferguson *v.* Birrell, 190 F. Supp. 506, 509 n.10 —(S. D. N. Y. 1960), *aff'd sub nom.* Ferguson *v.* Tabah, 288 F. 2d 665 (2d Cir. 1961).

dends.[18] Since the determination of whether a dividend should be declared rests in the first instance with the Board of Directors,[19] courts may intervene only when there has been bad faith, neglect or abuse of discretion.[20] This is indeed a heavy burden,[21] which plaintiff's experienced counsel frankly acknowledge. However, they stress that in each year after payment of debt, other corporate requirements and dividends on the Class A stock, substantial earnings were available to pay a much higher dividend than $5 on the Class B stock. This by itself, however, would not carry the day for the plaintiffs. The directors who were deposed swore that the declaration of dividends in each year was based upon prudent business judgment, which took into account MoPac's current and long range needs. This basically is the defense to plaintiffs' charges. The defendants emphasize that since the merger route was foreclosed to MoPac, it was essential, in order to protect its competitive position, to purchase large blocs of securities in other railroads, which required large cash expenditures; also that cash was used or required for equipment, up to date maintenance, capital improvement programs, current and projected, as well as other purposes vital to MoPac's competitive standing. To underscore their defense of prudent business judgment, the defendants refer to MoPac's Articles of Association which give the Board of Directors broad powers to set aside reserves and make such other provisions as the Board "shall deem to be necessary or advisable for working capital, for

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[18] *Cf.* Guttman *v.* Illinois Cent. R. R., 91 F. Supp. 285 (E. D. N. Y. 1950), *aff'd* 189 F. 2d 927 (2d Cir.), *cert. denied*, 342 U. S. 867 (1951); W. Q. O'Neall Co. *v.* O'Neall, 108 Ind. App. 116, 25 N. E. 2d 656 (1940); Dodge *v.* Ford Motor Co., 204 Mich. 459, 170 N. W. 668 (1919); Walsh *v.* Walsh, 285 Mo. 181, 226 S. W. 236, 245 (1920); Patton *v.* Nicholas, 154 Tex. 385, 279 S. W. 2d 848 (1955).

[19] *See* Wabash Ry. *v.* Barclay, 280 U. S. 197, 203 (1930); *see also* New York, L. E. & W. R. R. *v.* Nickals, 119 U. S. 296, 307 (1886).

[20] *See* Dodge *v.* Ford Motor Co., 204 Mich. 459, 170 N. W. 668, 681-82 (1919); 11 W. Fletcher, Private Corporations § 5325 (rev. ed. 1971) and cases cited therein.

[21] Staats *v.* Biograph Co., 236 F. 454, 457 (2d Cir. 1916).

expansion of the business of the Company . . . and for any other purpose of the Company."[22] The Court has reviewed the pretrial material on the issue of prudent business judgment and the defendants' position thereon cannot be said to be lacking in substance. In any event, it points up the issue as a substantial one to be resolved upon a trial. Plaintiffs, upon the whole case, would have the burden of establishing that the directors, notwithstanding the explanation of the factors which influenced their judgment, were in fact acting in bad faith or in an arbitrary manner. Directors are permitted a very liberal discretion in determining matters of business policy.[23] And if that discretion has been exercised in good faith, that it may have been injudicious or even if the Court believed a different policy were desirable, would not, by itself, be sufficient to sustain plaintiffs' burden.[24]

Moreover, even if plaintiffs should prevail upon the merits on the issue of additional dividends, it would not necessarily mean a total recovery. The Court would face the question of determining what would have constituted adequate dividends *in each year* during the period from 1964 through 1971—a decision requiring consideration of numerous variables, making the likelihood of substantial recovery questionable. The problem, as acknowledged by all parties, is difficult of solution. As counsel for Alleghany recognizes:

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[22] MoPac's Articles of Association, Article VII D(1).

[23] *Cf.* Fielding *v.* Allen, 99 F. Supp. 137, 142 (S. D. N. Y. 1951); Dodge *v.* Ford Motor Co., 204 Mich. 459, 170 N. W. 668, 681-82 (1919); Park *v.* Grant Locomotive Works, 40 N. J. Eq. 114, 117-18, 3 A. 162, 165 (Ch. 1885), *aff'd*, 45 N. J. Eq. 244, 19 A. 621 (Ct. Err. & App. 1888); Leslie *v.* Lorillard, 110 N. Y. 519, 532, 18 N. E. 363, 365 (1888); Casey *v.* Woodruff, 49 N. Y. S. 2d 625, 643 (Sup. Ct. 1944).

[24] *Cf.* Taussig *v.* Wellington Fund, Inc., 313 F. 2d 472, 479 (3d Cir.), *cert. denied*, 374 U. S. 806 (1963); Everett *v.* Phillips, 288 N. Y. 227, 43 N. E. 2d 18 (1942); Bourne *v.* Bourne, 240 N. Y. 172, 177-78, 148 N. E. 180, 181 (1925); Gallagher *v.* New York Dock Co., 19 N. Y. S. 2d 789, 800-01 (Sup. Ct. 1940), *aff'd*, 263 App. Div. 828, 32 N. Y. S. 2d 348 (2d Dep't 1942); *see also* Briggs *v.* Spaulding, 141 U. S. 132 (1891); Masterson *v.* Pergament, 203 F. 2d 315, 330 (6th Cir.), *cert. denied*, 346 U. S. 832 (1953).

> "Thus, if a finding of wrongdoing were made, there would remain the problem of proving the amount of additional dividends which should have been paid. The effect of this difficult problem of proof on the outcome of the lawsuit might well depend upon which party was deemed to have the burden of proof. If plaintiffs were required to prove that the dividends paid by MoPac were inadequate, that burden could have remained unmet and recovery could have been denied. On the other hand, if defendants were required to prove the adequacy of the dividends paid, they might well have failed to meet that burden, and as a result plaintiffs might have won a substantial recovery."[25]

Plaintiffs' problems are further compounded since it is doubtful that the Court would retain jurisdiction, as plaintiffs request, in order to monitor the MoPac Board's future dividend policy which, initially, is the Board's responsibility. Such future judicial supervision of MoPac's dividend policy would require the Court to make complex business decisions from year to year as to amounts to be retained out of earnings in order to determine the net income available for the declaration of dividends. In end result, were the Court to retain jurisdiction, it would be required to function as MoPac's sole director in place of its duly elected Board of Directors.

Some objectors cite *Dodge* v. *Ford Motor Co.*[26] as giving strength to plaintiffs' position. However, that court adopted the general principle against judicial intervention in corporate affairs. The *Dodge* court did conclude that plaintiffs had produced sufficient evidence to prove that the directors were running the corporation for the benefit of persons other than the stockholders and therefore justified in requiring the payment of reasonable dividends. The facts of the *Dodge* case are by no means similar to those in the instant case. Similarly, *Mayflower Hotel Shareholders Protective Committee* v. *Mayflower Hotel Corp.*[27]

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[25] Affidavit of M. Lauck Walton, Jan. 23, 1973, at 23.
[26] 204 Mich. 459, 170 N. W. 668 (1919).
[27] 173 F. 2d 416 (D. C. Cir. 1949).

merely demonstrates that the plaintiffs have alleged a valid cause of action, not necessarily a successful one.

As to the conspiracy charge—that Mississippi conspired with others by various acts and means to "freeze out" the Class B stockholders or to depress the market price of the stock—plaintiffs face perhaps an even heavier burden, since it is conceded that no tangible or direct evidence has thus far been unearthed to sustain the charge; perforce, plaintiffs would have to rely upon circumstantial evidence and urge that the fact finder draw inferences therefrom of wrongful motive and conspiratorial conduct.

The third cause of action, based upon defendants' acts and conduct in connection with the alleged conspiracy to "freeze out" the B shareholders and allegedly resulting in violations of section 10(b) of the Securities Exchange Act, the rule thereunder and defendants' common law fiduciary duties, also presents problems of proof to plaintiffs. Plaintiffs here charge that during the existence of the alleged conspiracy Mississippi and the defendant T. C. Davis bought and sold shares of B stock; that the objective of the scheme was to depress the market of the B stock, thereby forcing plaintiffs to sell at prices much below their true value. Even considering the current liberalization of Rule 10b-5,[28] and that plaintiffs' position may have some support,[29] plaintiffs must carry the burden of proving that defendants' actions were fraudulent[30] or unjustified,[31] and that such conduct in some way caused plaintiffs' injury.[32] As to the latter,

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[28] *See, e.g.,* Affiliated Ute Citizens *v.* United States, 406 U. S. 128 (1972); Superintendent of Ins. *v.* Bankers Life & Cas. Co., 404 U. S. 6 (1971).

[29] *See* Cochran *v.* Channing Corp., 211 F. Supp. 239 (S. D. N. Y. 1962).

[30] *See* List *v.* Fashion Park, Inc., 340 F. 2d 457 (2d Cir.), *cert. denied,* 382 U. S. 811 (1965).

[31] As to justification, the same problems will be encountered here as in the dividend cause of action.

[32] *Cf.* Superintendent of Ins. *v.* Bankers Life & Cas. Co., 404 U. S. 6, 12-13 (1971); Mutual Shares Corp. *v.* Genesco, Inc., 384 F. 2d 540, 546 (2d Cir. 1967).

it is interesting to note that plaintiffs do not seek separate relief on their 10b-5 claim; instead, they urge that the damages be measured by the amount of reasonable dividends allegedly withheld by the defendants during 1964-1971. By invoking this measure of damages, plaintiffs also face the same problems already discussed as to the extent of recovery under the dividend cause of action.

As to the derivative causes of action, one claim seeks to hold Mississippi and the individual defendants accountable for the expenses incurred by MoPac in connection with the plan to consolidate MoPac with T&P, which was abandoned following the Supreme Court decision. Even were the plaintiffs to establish that the proposed consolidation was not in MoPac's interest but calculated to favor Mississippi,[33] the likelihood of recovery on this claim is diminished by the holding by the Eighth Circuit Court of Appeals that MoPac was not responsible to the plaintiffs for their legal fees and expenses in the voting rights litigation.[34] Additionally, plaintiffs would be hard put to prove that the proposed consolidation of MoPac with T&P was not a justifiable business decision by the MoPac Board. As already noted, the Supreme Court expressly disavowed that it passed upon the merits of the proposal.

To state all the foregoing, of course, is no forecast of result upon a trial. It is simply to recognize, as the principals themselves do, that the action presents many obstacles, particularly for plaintiffs, who have the burden of proof. With the defendants vehemently denying wrongful conduct, were the case to be tried, all the issues would be vigorously contested, with the outcome obviously uncertain. The probability of ultimate success at best can only be cautious prophecy.

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[33] As to the merits, the Court of Appeals for the Eighth Circuit recognized the issues in the voting rights litigation were complex and that no court had passed upon the fairness of the plan itself. Missouri Pac. R. R. *v.* Slayton, 407 F. 2d 1078, 1082, 1083 (8th Cir.), *cert. denied*, 395 U. S. 937 (1969).

[34] Missouri Pac. R. R. *v.* Slayton, 407 F. 2d 1078 (8th Cir.), *cert. denied*, 395 U. S. 937 (1969).

Having examined the benefits of the settlement and the prospect of success upon a trial, other factors merit consideration. As all parties stress, were the plaintiffs to prevail upon the trial, or whatever its outcome, there would still remain the root cause of the conflict between the two classes of stockholders—the separation between equity ownership (principally in the B stock) and management control (in the A stock). And as long as it exists there will be continued hostility between the two and the potential of renewed litigation. Its elimination will be an advantage to all concerned. The settlement also provides for the elimination of Alleghany's ownership of equity stock, which Mississippi is to acquire. With Alleghany no longer an opposing force, it should mean stability in management and operation of MoPac.

Another factor favoring the settlement, but by no means determinative,[35] is the unanimous judgment of all the parties, their counsel and their investment analysts and advisers that its terms are eminently fair. To be sure, the final judgment as to the fairness of the proposal is the responsibility of this Court, but their joint recommendation is entitled to substantial weight,[36] particularly so in the instant case. A unique situation exists here not present in the usual stockholders' suit recommended to the courts for settlement, where ofttimes the plaintiffs representing the class own a relatively small economic interest in the corporation. Alleghany's self-interest as the owner of 53% of the Class B stock gives some assurance that it negotiated to obtain the best possible terms for that group vis-à-vis the Class A stockholders.[37] The other two plaintiffs, minority Class B stockholders, each also owns a substantial number of shares reflecting a heavy investment in the stock. Their counsel have acted inde-

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[35] *Cf.* Cohen *v.* Young, 127 F. 2d 721, 725 (6th Cir. 1942).

[36] *See* Cannon *v.* Texas Gulf Sulphur Co., 55 F. R. D. 306, 316 (S. D. N. Y. 1971); Percodani *v.* Riker-Maxson Corp., 50 F. R. D. 473, 477 (S. D. N. Y. 1970); Schleiff *v.* Chesapeake & O. Ry., 43 F. R. D. 175, 179 (S. D. N. Y. 1967); Glicken *v.* Bradford, 35 F. R. D. 144, 152 (S. D. N. Y. 1964); Fielding *v.* Allen, 99 F. Supp. 137, 144 (S. D. N. Y. 1951).

[37] *Cf.* Cherner *v.* Transitron Electronic Corp., 221 F. Supp. 48, 51 (D. Mass. 1963).

pendently of Alleghany's counsel in representing the interests of the Class B minority shareholders. These three plaintiffs and their counsel over a long period have been alert to enforce the rights of Class B stockholders. The lawyers for the plaintiffs in this action also represented them in the Missouri voting rights case and, over Mississippi's strong opposition, successfully upheld the right of the Class B stockholders as a separate group to vote upon consolidations. They are particularly knowledgeable with respect to the basic facts of MoPac and the hard core issues of this litigation; they are especially experienced in this field of law. Additionally, the parties, during the course of the litigation and in the negotiations, had the benefit of the advice of experienced independent railroad investment advisers and analysts. The record leaves no room to doubt that the negotiations were conducted in good faith and at arm's length, with the Class B stockholders represented by sophisticated, if not hardened, negotiators who deem the settlement the best result obtainable without a trial of the issues on the merits.[38]

Finally, the fairness of the settlement is emphasized by the provision that, despite Mississippi's and Alleghany's effective voting control by reason of their respective majority ownership of the class A and B stock, sufficient under MoPac's charter to put through a recapitalization, the Plan cannot be effected without the approval of a majority of the other stockholders of each class[39]—in effect, acceptance of the settlement rests with them regardless of the desires of Mississippi and Alleghany.

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[38] *Cf.* Mutual Shares Corp. *v.* Genesco, Inc., [1967-1969 Transfer Binder] CCH Fed. Sec. L. Rep. ¶92,315 (S. D. N. Y. 1968); Cherner *v.* Transitron Electronic Corp., 221 F. Supp. 48, 51 (D. Mass. 1963).

The fact that the form of the settlement decided upon is somewhat unusual and that it includes some benefits which cannot be evaluated in financial terms does not militate against its acceptance; the parties are permitted great freedom in shaping the form of settlement consideration. *Cf.* Derdiarian *v.* Futterman Corp., 38 F. R. D. 178 (S. D. N. Y. 1965); Manacher *v.* Reynolds, 39 Del. Ch. 401, 165 A. 2d 741, 747 (Ch. 1960); Levy *v.* Babb, 39 Misc. 2d 648, 241 N. Y. S. 2d 642 (Sup. Ct. 1963).

[39] *Compare* Winkelman *v.* General Motors Corp., 48 F. Supp. 490, 495 (S. D. N. Y. 1942).

The factors militating in favor of the settlement are indeed substantial, but a number of Class B stockholders challenge it as unfair and inadequate.

THE OBJECTIONS

At the hearing on this motion, Class B stockholders or their attorneys appeared and others communicated with the Court by letter to voice their objections to approval of the Plan. There are eighteen objectors who own a total of approximately 1,167 shares.[40] They concentrate their attack on the alleged inadequacy of the exchange for their holdings; its tax consequences; they also contend the settlement is unfair as between them and Alleghany as the majority Class B stockholder. Almost all the objectors agree that the litigation should be settled, but on better terms than those proposed; failing that, they urge rejection of the settlement.

The primary objection is that the package exchange of $850-16 shares of new common stock for each share of present Class B stock yields substantially less than the value of the shares to be surrendered. The substance of this challenge rests principally upon the existing rights of the Class B stock as against those of the Class A stock. A major premise in the objectors' attack is their view that realistically the Class A stock is a noncumulative preference stock limited to a $5 per year dividend and to $100 per share upon liquidation; that realistically the Class B stock is the common stock entitled to unlimited dividends as may be declared and to all MoPac's equity above the $100 per share attributable to the Class A stock. These differences are the hard core of the objectors' valuation and other contentions. However, merely to state the differences in rights between the two classes of stock is

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[40] The 39,371 outstanding Class B Shares are held by some 950 individuals or corporations. That a comparatively small number of holders of shares reflecting a small percentage of the total outstanding oppose, as against a great majority who favor, the settlement does not relieve the Court of its function in passing upon the fairness of the proposal. *See* Protective Comm. *v.* Anderson, 390 U. S. 414, 435 (1968); *cf.* American United Mutual Life Ins. Co. *v.* City of Avon Park, 311 U. S. 138 ,148 (1940).

too simplistic an approach; countervailing factors cannot be ignored. A factor of force is that the Class A stock, whether termed a "preference" or "hybrid" stock, or otherwise, has one vote per share, just as each share of Class B stock, with the result that the Class A stock not only controls the management of MoPac, but also can and, as plaintiffs charge, does exercise this control to withhold dividends from the Class B stock, whereas the Class B stock, a small minority of all outstanding shares, has the veto power over mergers, consolidations and other important corporate actions, and yet it is without sufficient voting strength to elect even one director. Another countervailing factor which cannot be disregarded is that the Class A stock, while noncumulative, is entitled to receive dividends out of retained earnings in each year even if current earings for a particular year may be insufficient to cover dividend requirements on the A stock. Consideration of the objectors' contentions with respect to the value of their stock cannot ignore these elements. Thus we turn to the specific objections.

Almost all the parties are in accord that the new common shares can be valued at about $100 per share, so that the $850-16 share package conversion rate equals approximately $2,450 for each present Class B share. But objectors and proponents differ on the present value of the B stock, as well as the A stock. It would serve no useful purpose to analyze in detail their computations whereby they evaluate the present worth of each class. Their differing estimates derive from the methods used to value the shares.

Most objectors evaluate the shares by their book value. Several apply the capitalization of net earnings method; in this instance, they allocate to the Class B stock all of MoPac's annual net earnings above the annual Class A dividend requirements. Their position is that the earnings of the Class A stock cannot exceed its maximum dividend, that is $9,319,000, or $5 per share, and consequently the balance of each year's earnings should be allocated to the Class B stock. By their respective methods the objectors calculate that the present worth of each share of Class B stock ranges from somewhat over $4,000 to the unrealistic, if not astronomical, figure of $25,000. Those

objectors who capitalize net earnings as allocated by them to the Class B stock estimate, at a price-earnings ratio of 10-1, its value at $4,450 per share. At a 9-1 ratio, it would be $4,005 per share (1972 earnings).

The proponents, in evaluating the present worth of the two classes of stock, also apply the capitalization of recent earnings method (1971-1972). However, their method of allocation of earnings differs from that of the objectors. Instead of deducting the Class A maximum annual dividend requirement from net earnings, the proponents take into account the market value of the Class A stock which, shortly before the announcement of the settlement, was selling between $70-75 per share.[41] They capitalize MoPac's earnings for the two years on a 9-1 basis, resulting in its capitalized value of $225,000,000 to $243,000,000. The market value of the Class A stock is deemed its true value, and accordingly its aggregate market value is deducted from MoPac's capitalized value and the difference allocated to the Class B stock, with the end result that the Class B stock is valued at an average of $2,365 per share; a 10-1 capitalization rate would bring the average value somewhat higher.

Before considering the respective contentions, it is desirable to emphasize the Court's function on this application, already referred to; particularly so, since a number of objectors advance their arguments of stock valuation as if this were a proceeding under section 77 of the Bankruptcy Act,[42] where the phrase priority rights of senior securities owners on the basis of full compensatory value. The Court here is not called upon to make a definitive assessment of the value of each class of stock, old or new—that is not even a requirement were the proceeding one under section 77,[44] where with its standard of "fair and equit-

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[41] Consideration was given to the effect of the public announcement of the proposed settlement.

[42] 11 U. S. C. § 205.

"fair and equitable," a term of art,[43] requires recognition of

[43] Case *v.* Los Angeles Lumber Prods. Co., 308 U. S. 106, 115 (1939).

[44] *See* Group of Institutional Investors *v.* Chicago, M., St. P. & Pac. R. R., 318 U. S. 523, 564-65 (1943).

able," it is recognized that "the pretenses of exactitude" in determining a dollar value for a railroad property is somewhat illusory.[45] The Court here is concerned with a proposed settlement of a lawsuit and whether its terms, taking into account the probabilities of success upon a trial, and all pertinent factors, are "fair, reasonable, and adequate . . . terms [that] are general and cannot be measured scientifically."[46] In passing upon a proposed settlement of a stockholder's litigation, the standard "fair, reasonable and adequate" is not to be equated with "fair and equitable," applicable to a proposed railroad reorganization under the Bankruptcy Act. In the compromise of a stockholder's lawsuit there necessarily come into play "practical adjustments,"[47] elements of give and take by the respective interested parties, depending upon their strengths and weaknesses in the litigation;[48] and, of course, the uncertainty of its outcome, as well as the rewards, if successful, are important considerations in the process of compromise and concession.

First, as to book value as a method of valuation. The authorities are in agreement that book value is of little significance in appraising the value of stock; that what is of prime significance is a corporation's earning potential based on past experience.[49] The contention made by the objectors as to the change in equity between the two classes of stock is related to the book value concept. There appears to be no dispute that should the new preferred (1,864,052) shares be converted into new common, the equity position of the B stockholders would be reduced from 61½% to 25½%. The objectors and proponents differ as to

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[45] *Id.* at 565.

[46] West Virginia *v.* Chas. Pfizer & Co., 314 F. Supp. 710, 740 (S. D. N. Y. 1970), *aff'd*, 440 F. 2d 1079 (2d Cir.), *cert. denied*, 404 U. S. 871 (1971).

[47] *Cf.* Group of Institutional Investors *v.* Chicago, M., St. P. & Pac. R. R., 318 U. S. 523, 565 (1943).

[48] *See* Masterson *v.* Pergament, 203 F. 2d 315, 330 (6th Cir.), *cert. denied*, 346 U. S. 832 (1953); Percodani *v.* Riker-Maxson Corp., 50 F. R. D. 473, 477 (S. D. N. Y. 1970).

[49] *Cf.* Ecker *v.* Western Pac. R. R., 318 U. S. 448, 483 (1943); Consolidated Rock Prods. Co. *v.* Du Bois, 312 U. S. 510, 525-26 (1941).

the importance of the shift in equity. The terms equity and book value are essentially synonymous.[50] They would have relevance if there were the prospect of MoPac's liquidation[51] or a takeover of the railroads by the government. Neither liquidation nor the nationalization of the railroads of the country is an imminent likelihood. Judge Learned Hand's sage observation of the fallacy of measuring the value of shares by their book value is as sound today as when he stated it almost fifty years ago:

> "The suggestion that the book value of the shares is any measure of their actual value is clearly fallacious. It presupposes, first, that book values can be realized on liquidation, which is practically never the case; and, second, that liquidation values are a measure of present values. Everyone knows that the value of shares in a commercial or manufacturing company depends chiefly on what they will earn, on which balance sheets throw little light. . . ."[52]

Next, as to the capitalization of earnings method, it has been already noted that the difference in valuation between objectors and proponents of the Class A and Class B stock results from different methods of allocating earnings to the two. Since the matter is one of judgment, there is room for disagreement. The Court has examined the submissions of the parties on this subject and is persuaded that the method of valuation, which takes into account the market value of the Class A shares and the underlying factors in its support offered by an expert retained to give an independent evaluation, is of substance and merits consideration.[53] The expert, after taking into account the mar-

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[50] *See* Accountants' Handbook § 3, at 11 (R. Waxon ed. 1965); Prentice-Hall Encyclopedic Dictionary of Business Finance 78-79, 237 (1960).

[51] MoPac's financial expert is of the view that were the corporation to liquidate it would probably be in such poor financial condition that no equity would be available for distribution to stockholders. Affidavit of F. L. Lee Jones, Jan. 23, 1973, at 6.

[52] Borg *v.* International Silver Co., 11 F. 2d 147, 152 (2d Cir. 1925).

[53] Affidavit of F. L. Lee Jones, Jan. 23, 1973.

ket value of the Class A stock, valued the Class B stock at $2,365 per share.[54]

The Class A stock is listed on the New York Stock Exchange, is traded in a broad market, and almost 700,000 shares are held by the public. With an active market for the Class A stock, it cannot be said that to ascribe the market price as its fair value is unreasonable. The market evaluation of a stock may reflect a more realistic appraisal of its value than a conceptual evaluation. Theory must yield to the reality of the market place, "the true appraiser."[55] Indeed, to quote Judge Learned Hand again: "When all is said, the value is nothing more than what people will pay for. . . ."[56]

The Class B stock is traded on the over-the-counter market; the market is thin; and the traders are few. The market for the Class B stock has never approached the values urged by the objectors. The range has been between $1,100 and $2,500 per share.[57] The conclusion is warranted that the public market, in pragmatic terms, has taken into account MoPac's unusual capitalized structure, whereby a so-called preference stock has voting rights that control not only MoPac's management, but also its

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[54] Alleghany's chief financial officer also took into account the market value of the Class A stock in appraising the value of the Class B stock and reached approximately the same valuation. Affidavit of John J. Burns, Jan. 22, 1973.

[55] New York, N. H. & H. R. R., 1st Mtg. 4% B. C. *v.* United States, 305 F. Supp. 1049, 1069 (S. D. N. Y. 1969) (Weinfeld J. dissenting), *vacated sub nom.* New Haven Inclusion Cases 399 U. S. 392 (1970).

[56] Borg *v.* International Silver Co., 11 F. 2d 147, 152 (2d Cir. 1925).

[57] While the Class B stockholders contend that the market price of their stock has been depressed by the acts of the defendants, we deal with the fact situation as it exists. Whether the market price of the Class B shares is the consequence of defendants' alleged conduct is one of the issues to be decided were the case to go to trial. Similarly, objections directed at the failure of MoPac to report the earnings allocable to the B shares, as to which defendants offer an explanation, also go to the merits of plaintiffs' claim, not to the fairness or adequacy of the settlement.

dividend policy with the power to withhold dividends from the Class B stock, and accordingly appraised the value of the two classes of stock based upon their respective power, rights and restrictions.

Another factor suggests that the proponents' experts' valuations are closer to the mark than the objectors' valuations. Alleghany, as the majority owner of the Class B stock, has, through through the years, been the principal antagonist to Mississippi, the majority owner of the Class A stock. Widely divergent views as to the B stock's value have, up to the present, foreclosed any compromise. Alleghany's acceptance of the settlement as a disposition of their longstanding controversy during which it has spent millions to protect its investment may be said to reflect a realistic recognition of the true value of the Class B shares. If the objectors' evaluation of $4,000 or more per share is sound, then Alleghany, owning in excess of 21,000 shares, has, after many years of litigation, suddenly given up the ghost and yielded more than $40,000,000[58]—hardly a likelihood in view of the history of events and the sophistication of its financial executives and advisers.

Also, it is not without significance that objector Garfield's securities expert, who on the capitalization of earnings method fixes a value of "over $4,000" a share for the Class B stock, nonetheless concludes "that if the impasse between the Class A and the Class B is to be settled, there must be a compromise at a lower figure to reflect the lack of voting control of the Class B"[59]—another way of saying that any evaluation of the stock must make allowance for its encumbered status. Obviously that compromise figure cannot be a matter of mathematical precision; it need not be; it is a matter of judgment based upon a consideration of factors pro and con, some of which have been adverted to above. This Court is satisfied that the package of

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[58] Even assuming objector Garfield's contention as to tax consequences is correct (*see* p. 47 *infra*), an alleged tax benefit of $4,000,000 to Alleghany under the part cash payment plan would hardly justify giving up $40,000,000.

[59] Affidavit of David M. Day, Jan. 30, 1973, ¶5.

$850-16 shares common stock in exchange for each Class B share cannot be said to be inadequate, especially so when considered as a compromise.

However, the objectors argue that even so, the plan is unfair in that the compromise should be only in terms of new common stock and not include any cash payment. They contend that the $850 cash payment per share will be taxed as ordinary income, and with their individual income situations they will be subjected to high surtax rates, whereas Alleghany, by reason of its corporate structure, faces, with respect to the cash payment, a 7.2% rate. Objector Garfield contends that under the cash-stock exchange, Alleghany will benefit by over $4,000,000 in comparison with an all stock plan. Several alternative plans, including a tax free exchange (24½ shares of new common instead of the $850-16 shares for each Class B share) are proposed by objectors as being more equitable. Many of these suggestions were considered during the course of the extended negotiations. One such plan envisaged giving the minority Class B stockholders an option to receive all stock (24½ shares) in exchange for each Class B share instead of the $850-16 share package. However, based upon the opinion of independent tax counsel retained especially by the Class B representatives, other than Alleghany, this alternative was rejected since its tax consequences were potentially more unfavorable than those under the cash and stock exchange. Independent tax counsel was of the view that such an option would have exposed a substantial portion of the shares to ordinary income tax treatment.

Another approach would have eliminated the cash payment and given only stock to all Class B stockholders, including Alleghany. This proposal met with rejection because it would lower Mississippi's degree of control below its present level and further could fail to eliminate the present divided control within MoPac since Mississippi would control the preferred but not necessarily the common. To assure elimination of the divided control, as well as the friction and litigation it has engendered, Mississippi deems it essential that it have a substantial majority interest in both classes of stock. This accounts for its cash tender offer

to purchase not less than 400,000 shares of new common at $40,000,000 and Alleghany's commitment to tender all its 339,888 shares of new common stock upon their receipt. Additionally, the proposal would place Alleghany in a minority position without real control over its investment and deprive it of the veto power it now has as the majority owner of the present Class B stock. Neither Mississippi nor Alleghany was amenable to this situation. Objector Garfield's suggestion that if Mississippi desires to retain its present degree of stock control that it purchase the additional shares of the new common stock to be issued to Alleghany under an all stock exchange would require Mississippi to expend, in addition to its present commitment of $40 million cash, another $20 million, an added obligation it is not prepared to assume.

Whether or not the reasons for rejection of the alternative proposals were justified is not the question before this Court, which is called upon to decide whether the settlement reached by the litigants and submitted for approval is fair and reasonable. The discharge of this function does not require the Court to reopen negotiations in an effort to secure more advantageous terms, which plaintiffs, in sophisticated and arms length bargaining, were unable to secure for themselves and the class they represent. Taxes are taxes; the rates are fixed by Congress; they cannot be adjusted in particular cases to accommodate an individual taxpayer's obligation as to income derived from the settlement of a lawsuit. The tax will vary in the instance of each Class B stockholder dependent upon his particular bracket, and even corporations other than Alleghany, which may own Class B stock, will face varying tax payments. The fact is that two-thirds of the conversion package is tax free. Moreover, were the case to proceed to trial and plaintiffs secured a judgment declaring the Class B stockholders entitled to dividends in given years, the entire proceeds received by each shareholder would be taxed as ordinary income. Under all these circumstances, it cannot be said that the $850 cash payment constituting part of the conversion rate is unfair.

Other Objections

Several objectors question the adequacy of the notice of the proposed settlement given to stockholders, which was mailed to each registered stockholder and published in the Wall Street Journal (National Edition). The objections go to the contents of the notice. However, it sufficiently informed any interested stockholder of the nature of the pending action, the general terms of the settlement, that complete and detailed information was available from the files of this Court, and that any stockholder could appear and be heard at the hearing; in sum, the notice fairly apprised the members of the class of the pertinent terms of the proposed compromise and the significance of the entry of a final judgment approving the settlement.[60]

Two Class A stockholders of fifty shares object because the settlement is contingent upon Mississippi's ability to finance its tended offer obligation, and therefore, "if such financing is not available, the parties will have gone to considerable expense . . . to no good purpose." However, Mississippi already has secured a formal commitment of financing which has been found satisfactory by Alleghany and its counsel.[61] The same objectors also express concern over the possible effects of the cash payout upon MoPac's financial structure. MoPac has represented that this presents no problem to a railroad of its size.[62]

A MoPac debenture holder has raised a question as to possible impairment of the rights of debenture holders. Under the terms of the settlement, an opinion of MoPac's counsel is required to the effect that none of the transactions are in breach or in default of any of the provisions of any indenture or other

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[60] *Cf.* Air Lines Stewards Local 550 *v.* American Airlines, Inc., 455 F. 2d 101, 108 (7th Cir. 1972); *see* United Founders Life Ins. Co. *v.* Consumers Nat'l Life Ins. Co., 447 F. 2d 647, 654 (7th Cir. 1971); *see also* Winkleman *v.* General Motors Corp., 48 F. Supp. 490, 494 (S. D. N. Y. 1942).

[61] Defendant's Supplemental Reply Memorandum at 5-6; Hearing Minutes at 41-42.

[62] *See* Jones Affidavit at 5; Affidavit of Downing B. Jenks, Jan. 22, 1973, at 10.

instrument binding upon MoPac. It is represented to the Court that MoPac's counsel upon a review of all documents is prepared to render such an opinion.

Objections are made to fees requested by attorneys representing the respective plaintiffs. To the extent that such allowance may be granted, the parties are to be paid equally by Mississippi and MoPac. However, the fee applications are, in the event of acceptance of the settlement, subject to approval by the Court and a separate hearing, notice of which will be given to all interested parties, at which time any objections may be presented to the Court.

Conclusion

This Court, after thorough consideration of all pertinent factors and of the extensive contentions of the objectors and proponents with respect thereto, and weighing the benefits to be derived from the settlement against the alternative of a continuance of this litigation, with its outcome doubtful, and, even if successful, the uncertainty of any meaningful recovery, concludes that the settlement falls within a "range of reasonableness"[63] that warrants its approval. In sum, it offers a permanent solution to the longstanding impasse between the two contending groups of stockholders—a result that cannot be achieved through successful litigation. Indeed, continued litigation may be said to be an exercise in futility since the hard core of the cause of the differences between the two groups would remain and continue to plague them and MoPac. The settlement will afford MoPac the opportunity to pursue merger prospects so vital to its economic growth and existence and to permit its officials to give full time and attention to corporate affairs. Also it means the prospect of greater annual dividends to the Class B stockholders; a broader market for their shares; and the opportunity for representation on the Board of Directors. Even were it to be found

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[63] *See* Newman *v.* Stein, 464 F. 2d 689, 693 (2d Cir.), *cert. denied* —— U. S. —— (1972); see also United Founders Life Ins. Co. *v.* Consumers Nat'l Life Ins. Co., 447 F. 2d 647, 655-56 (7th Cir. 1971).

that the Class B stock approached the approximate $4,000 value per share as estimated by a number of objectors, the settlement still would come within a range of reasonableness and warrant approval. Finally, if a majority of the minority Class B stockholders are of the view that the advantages of the settlement are insufficient to compensate for what they believe to be the value of their shares, they have the power to reject it.

The settlement is approved and judgment may be entered accordingly.

Dated: New York, N. Y.
March 19, 1973

United States District Judge
EDWARD WEINFELD

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twelfth day of June one thousand nine hundred and seventy-three.

PRESENT: HON. IRVING R. KAUFMAN, Chief Judge,
HON. J. JOSEPH SMITH, Circuit Judge,
HON. FREDERICK P. BRYAN, District Judge.

73-1864
73-1865

BETTY LEVIN, on behalf of herself and all other holders of the Class B Common Stock of Missouri Pacific Railroad Company, and on behalf of said corporation and ROBERT LEVASSEUR and ALLEGHANY CORPORATION,

Plaintiffs,

WILLIAM R. WESSON, a Class B Stockholder in MISSOURI PACIFIC RAILROAD COMPANY,

Plaintiff-Appellant,

v.

MISSISSIPPI RIVER CORPORATION, MISSOURI PACIFIC RAILROAD COMPANY, ROBERT H. CRAFT, T. C. DAVIS and THOMAS F. MILBANK,

Defendants-Appellees.

Judgment

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the *transcript of record* from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed on Judge Weinfeld's opinion below, —— F. Supp. —— (S. D. N. Y. 1973).

IRVING R. KAUFMAN
Chief Judge

J. JOSEPH SMITH
Circuit Judge

FREDERICK P. BRYAN
District Judge

SUPREME COURT, U. S.

FILED

1975

MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1171

NAPOLEON C. GABRIEL, ET AL.,

Petitioners,

v.

BETTY LEVIN, ET AL.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

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October Term, 1974

No. 74-1171

NAPOLEON C. GABRIEL, *et al.*,

Petitioners,

v.

BETTY LEVIN, *et al.*,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

This brief is submitted by all respondents (plaintiffs and defendants below) in opposition to the petition for certiorari of Napoleon C. Gabriel and Michael Moumousis. That portion of the brief dealing with the allowance of fees (Point II, below) is submitted only on behalf of plaintiffs, since defendants take no position on the subject.

The Decisions Below

This stockholders' representative and derivative action was brought by Class B stockholders of defendant Missouri Pacific Railroad Company ("MoPac") mainly to compel the payment of greater dividends on the B stock. The Dis-

trict Court for Southern New York, Weinfeld, J., approved the settlement of the action by judgment of May 2, 1973 (A. 367, 389);* the Second Circuit affirmed on Judge Weinfeld's opinion (A. 401); and this Court denied certiorari and rehearing (A. 402, 419). *Levin* v. *Mississippi River Corp.*, 59 F.R.D. 353 (S.D.N.Y.), *affirmed* on opinion below sub nom. *Wesson* v. *Mississippi River Corp.*, 486 F. 2d 1398 (2d Cir.), *cert. denied* sub nom. *Wesson* v. *Levin*, 414 U.S. 1112 (1973), rehearing denied, 415 U.S. 939 (1974).

The settlement was also approved by the Interstate Commerce Commission (A. 420, 513) and by overwhelming majorities of both classes of MoPac's stock (A. 437-39). It was fully consummated in January 1974 (A. 142).

The present petition seeks review of three post-settlement decisions of the District Court (A. 65, 86, 165), all three affirmed by the Second Circuit (Pet. A1):

1. In November 1973 petitioner Moumousis moved to set aside the May 2 judgment approving the settlement, purportedly on the ground of newly discovered evidence (A. 1 et seq.). Judge Weinfeld's unreported decision of December 5, 1973 denied the motion (A. 65).

2. In February and March 1974 petitioner Gabriel moved to modify or set aside the judgment on jurisdictional grounds (A. 70, 72). Judge Weinfeld's unreported decision of April 8, 1974 denied the motions (A. 86).

3. In March 1974 plaintiffs and their counsel applied for the allowance of legal fees and expenses (A. 90, 109). Judge Weinfeld's decision of June 26, 1974 (A. 165) granted the applications except for a reduction in amount, *Levin* v. *Mississippi River Corp.*, 377 F. Supp. 926 (S.D.N.Y. 1974).

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* "A." refers to the Appendix below.

Upon petitioners' appeals, the Second Circuit affirmed the three decisions from the bench, *Levin* v. *Mississippi River Corp.*, 508 F. 2d 836 (2d Cir. 1974); Pet. Al. The present petition followed.

To avoid undue length of presentation, we respectfully refer to the decisions below (A. 165, 367) for a detailed narrative of the facts.

Counter-Statement of the Questions Presented

1. Are petitioners' attacks on the settlement barred by its judicial approval?

2. Did the District Court abuse its discretion in the award of fees by taking into account the services of some of plaintiffs' counsel in an earlier related action, which the Court found to have been "the basis and hard core of this litigation"?

3. Is the fee award premature?

REASONS FOR DENYING THE WRIT

POINT I

Petitioners' attacks on the settlement of this action are barred by the judgment approving the settlement.

The bulk of the petition asks this Court to review the validity of the settlement. Petitioners simply ignore that this issue is barred by res judicata. After a full hearing (A. 245) on notice to all of MoPac's stockholders (A. 389-90), the District Court approved the settlement by its judgment of May 2, 1973. A Class B stockholder, William R. Wesson, appealed from the judgment; he was repre-

sented by the same Gerard M. Carey, Esq., who now appears as attorney for these petitioners. The Second Circuit affirmed the judgment. Mr. Carey (still on behalf of Wesson) applied for certiorari and, when that was denied, applied for rehearing, again unsuccessfully. In these proceedings, Mr. Carey advanced precisely the same arguments that he now invokes in his new role as attorney for the present petitioners. Not a single fact has been added that was not before this Court and the Court of Appeals in the *Wesson* proceedings. Since Wesson's attack on the settlement was held not to merit review by this Court, the present petition—additionally burdened as it is by the bar of res judicata—is *a fortiori* unmeritorious.

We briefly review petitioners' individual points.

1. Petitioners contend that the settlement could not properly provide for a recapitalization of MoPac because the complaints did not ask for that relief. The same contention was advanced and overruled in connection with the approval of the settlement (see 59 F.R.D. at 367 n. 38). But even if the point were still open, it would be untenable; court-approved settlements frequently call for a consideration not sought and not obtainable under the complaint.*

2. Petitioners contend that the settlement was unfair because, under its terms, the equity of the Class B was reduced from 65% to 25% and because the Class B stock, allegedly worth $22,500 or more per share, was exchanged

* Thus, in *Masterson* v. *Pergament*, 203 F. 2d 315, 335 (6th Cir.), *cert. denied*, 346 U.S. 832 (1953), the settlement consideration included a guaranty by one of the defendants of a bank loan to the corporation, and a sale by the corporation to another defendant of machinery at a price in excess of recoverable value. In *Levey* v. *Babb*, 39 Misc. 2d 648, 241 N.Y.S. 2d 642 (Sup. Ct. 1963), the directors of a parent company exchanged, as part of a settlement, their 50% stock interest in the subsidiary for minority stock in the parent.

for cash and new stock worth $2,450. Again this contention was considered and overruled upon approval of the settlement, by the District Court (59 F.R.D. at 367-372), the Court of Appeals (A. 401), and the ICC (A. 420, 513). Even if the point were still open, the valuation of the Class B stock would present an issue of fact hardly warranting review by this Court.

3. Petitioners contend that the recapitalization of MoPac took their property without due process of law and that neither the Court nor plaintiffs had the right or power to compel a recapitalization. This is but a rehash of the first two points. Moreover, under the Settlement Agreement, the recapitalization required, and received, stockholder approval in accordance with the applicable Missouri law; in addition, it required, and received, the votes of the minority stockholders of each class (A. 211, 219, 437-39). Petitioners cannot complain of a recapitalization effected in accordance with the applicable state law and the wishes of large majorities of the stockholders.

4. Petitioners contend that, under the rule of *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973), the District Court lacked jurisdiction of the claims of those stockholders whose interest did not exceed $10,000. The point was raised in Mr. Wesson's petition for rehearing of his application for certiorari (A. 409-410), which this Court denied (A. 419). The same point could also have been raised when the approval of the settlement was before the District Court.* It is now foreclosed.

In any event, the District Court had clear and complete jurisdiction of this action, of the settlement, and of the

* This Court's decision in *Zahn* is, of course, not newly discovered evidence. It is not even new law; see *Zahn* v. *International Paper Co.*, 469 F. 2d 1033 (2d Cir. 1972), which had been decided prior to the settlement hearing herein.

claims of all Class B stockholders, regardless of the amount of their individual interest. This Court's decision in *Zahn* dealt only with "spurious" class actions under subdivision (b)(3) of Rule 23; in this type of suit the claims of the class members cannot be aggregated because they are "separate and distinct" (414 U.S. at 296, 300, 301). The present action was declared to be a class suit under subdivisions (b)(1) and (b)(2)—not (b)(3)—of Rule 23 (A. 176-178). It was, therefore, not a "spurious", but a "true" or "genuine" class action. The claims of the Class B stockholders to the declaration of greater dividends were not "separate and distinct", but "joint or common"; for "A stockholder suing to compel the corporation to declare a dividend is enforcing a right common to himself and the other stockholders against the corporation * * *;" *Doherty* v. *Mutual Warehouse Co.*, 245 F. 2d 609, 612 (5th Cir. 1957). In a class suit to enforce a joint or common right of the class members, aggregation of their claims is proper; *Berman* v. *Narragansett Racing Ass'n*, 414 F. 2d 311 (1st Cir. 1969), *cert. denied*, 396 U.S. 1037 (1970).

Moreover, the District Court had jurisdiction regardless of the jurisdictional amount. The amended complaint herein alleged a claim under § 10(b) of the Securities Exchange Act, 15 USC § 78j(b) (A. 200-201). Jurisdiction of this statutory claim did not depend on the presence of the jurisdictional amount, § 27 of the Exchange Act, 15 USC § 78aa. An express allegation predicating federal jurisdiction upon these provisions was unnecessary; see Official Form 2(c) appended to the Federal Rules of Civil Procedure.

The rule of the *Zahn* case is, therefore, inapplicable to the case at bar. The District Court properly so held (A. 86).

5. Petitioners contend that plaintiff Alleghany Corporation was not a proper class representative because

its tax interests were allegedly different from, or opposed to, those of the other Class B stockholders. The same contention was considered and overruled upon approval of the settlement (59 F.R.D. at 371-72). Moreover, as the District Court took pains to point out, the interests of the Class B stockholders other than Alleghany were fully and adequately protected by plaintiffs Betty Levin and Robert LeVasseur and their counsel (59 F.R.D. at 366-67).

According to petitioners, Alleghany's supposedly adverse interest arose from the fact that the MoPac Class B stock it owned was held in a voting trust subject to supervision by the ICC. Both the trusteeship and the ICC supervision were, however, fully revealed at and before the settlement hearing,* so that they cannot now be invoked as newly discovered evidence (A. 65).

Petitioners' attacks on the settlement are frivolous and present no questions deserving review by this Court.

POINT II

The District Court's award of fees and expenses to plaintiffs and their lawyers was legally correct and presents no question inviting review by this Court.

Pursuant to its broad equitable powers, *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 389-97 (1970); *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939), and in ac-

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* The Settlement Agreement recited that, "pursuant to order of the Interstate Commerce Commission, the Class B stock beneficially owned by Alleghany is held by Franklin National Bank ('Franklin') as voting trustee * * *" (A. 210).

Long before, in connection with Alleghany's motion to intervene in the action, it had submitted copies of the voting trust agreements, which referred at length to the ICC orders. See affidavit of Granville Whittlesey, Jr. of April 29, 1968, to which copies of the voting trust agreements were annexed.

cordance with the terms of the settlement (A. 206-07, 233), the District Court awarded legal fees and expenses to plaintiffs and their counsel, payable by MoPac and its co-defendant, Mississippi River Corporation ("MRC") (A. 165; 377 F. Supp. 926). The Court of Appeals affirmed. Petitioners do not question the power of the District Court or the soundness of the exercise of its discretion. Their attacks on the awards are limited to three narrow legal questions. None of them has substance.

1. According to petitioners, the award to counsel for plaintiffs Levin and LeVasseur should not have taken into consideration the services these lawyers had rendered in the so-called "voting rights litigation". That litigation, described in the decisions below (A. 372-73, 170), was brought in 1963 to enjoin a merger plan of MoPac, which was allegedly designed to eliminate the Class B stock and give its equity to the Class A. This Court's decision, *Levin* v. *Mississippi River F. Corp.*, 386 U.S. 162 (1967), finally determined that the merger plan required separate approval by the Class B. Since that approval could not be obtained, MoPac abandoned the plan.

Plaintiffs could bring the present suit for greater dividends on the Class B stock only because the voting rights action kept the Class B stock in existence. What is more, this Court's 1967 decision established the strategic position of the Class B by sustaining its right to veto any merger or consolidation of MoPac. The successful prosecution of the voting rights litigation was thus, as Judge Weinfeld held, "the basis and hard core of this litigation" and "was a principal factor in bringing about the settlement" (A. 170).

In circumstances such as these, it is thoroughly settled that the allowance in a class or derivative suit may include services rendered in a prior action, provided it is suffi-

ciently related to the ultimate recovery. *Angoff* v. *Goldfine*, 270 F. 2d 185 (1st Cir. 1959); *Honda* v. *Mitchell*, 419 F. 2d 324 (D.C. Cir. 1969); *Paris* v. *Metropolitan L. Ins. Co.*, 94 F. Supp. 792 (S.D.N.Y. 1947); *Chapman* v. *United States*, 314 F. Supp. 549, 556 n. 7, 561 (C.D. Cal. 1970).

Petitioners do not even attempt to rebut the intimate connection, found by Judge Weinfeld, between the present suit and the voting rights litigation. Nor do they question the soundness of *Angoff* v. *Goldfine, supra,* and similar cases. Their attack on this aspect of the fee award is thus completely baseless.

2. Equally groundless is petitioners' contention that an award for services in the voting rights litigation is barred by res judicata. The successful lawyers in that case sought a fee award *against MoPac,* but the Eighth Circuit refused it, *Missouri Pac R. Co.* v. *Slayton,* 407 F. 2d 1078 (8th Cir.), *cert. denied,* 395 U.S. 937 (1969). The Court of Appeals recognized that "the Class B stockholders obtained a very substantial benefit from the litigation" (p. 1081); but the plaintiffs' rights against the Class B stockholders were not before the Court (p. 1082); and any benefit to MoPac was held to be only incidental and too insignificant to support an allowance against MoPac (p. 1083).

It is thus plain that the Eighth Circuit's decision was not intended to foreclose petitioners from seeking an allowance against the Class B, and Judge Weinfeld so held (A. 170-71). For purposes of the present settlement, the fee obligation of the Class B stockholders has been assumed by MoPac and MRC (A. 207, 233). Neither the obligation of the Class B nor its assumption by MoPac and MRC is affected by the decision of the Eighth Circuit.

3. Petitioners contend that the fee award was premature. The settlement agreement provided, however, that

plaintiffs were to apply for the allowance of fees and expenses "[a]fter the entry of a final judgment by the Court approving the terms of settlement contained herein, and after such final judgment is no longer subject to appeal" (A. 233). The final judgment approving the terms of the settlement was entered on May 2, 1973 (A. 389-91). Upon affirmance by the Second Circuit and the denial of certiorari and rehearing by this Court (the latter on February 19, 1974, A. 419), the judgment was "no longer subject to appeal". The time for allowances had thus arrived. Plaintiffs' applications, filed in March 1974 (A. 90, 109), were granted on June 26, 1974 (A. 165).

Petitioners assert, without any support in the record, that three "appeals" are still pending (Pet. 17-18). Since the proceedings referred to are captioned in the District Court for New Jersey (*ibid.*), they can hardly constitute "appeals" from the judgment approving the settlement of the present action in the Southern District of New York.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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